

1895

BEING SEA TRIBUNAL OF ARBITRATION

OPINIONS

OF

SENATOR MORGAN

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OPINIONS
OF
SENATOR MORGAN
AT THE
CONFERENCE IN PARIS
OF THE

BERING SEA TRIBUNAL OF ARBITRATION, CONSTITUTED BY THE
TREATY OF FEBRUARY 20, 1892, BETWEEN HER BRITANNIC
MAJESTY AND THE UNITED STATES OF AMERICA, AND
COMPOSED OF THE FOLLOWING MEMBERS:

BARON DE COURCEL,

Senator and Ambassador of France, President of the Tribunal;

THE RIGHT HONORABLE LORD HANNEN,
Of Great Britain;

THE HONORABLE SIR JOHN THOMPSON,
Minister of Justice and Attorney-General of Canada;

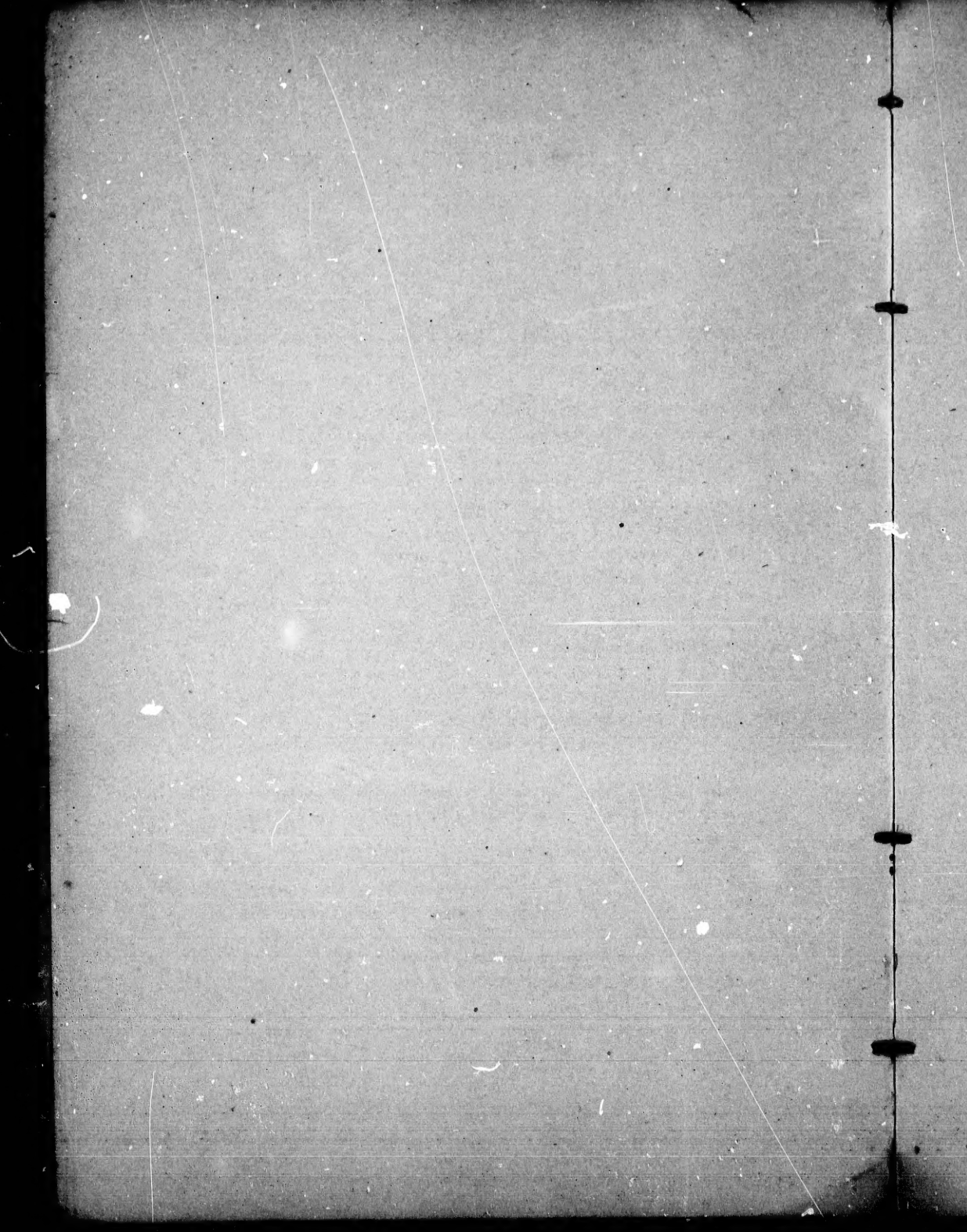
MR. JUSTICE HARLAN,
A Justice of the Supreme Court of the United States;

SENATOR MORGAN,
A Senator of the United States;

MARQUIS EMILIO VISCONTI VENOSTA,
Former Minister of Foreign Affairs, and Senator of the Kingdom of Italy;

And HIS EXCELLENCY GREGER SGRAM,
Minister of State of Norway.

WASHINGTON, D. C.:
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1893.



THE TRIBUNAL HAVING UNDER CONSIDERATION THE MOTION OF MR. JUSTICE HARLAN, SET FORTH IN THIS PAPER, SENATOR MORGAN SUBMITTED THE FOLLOWING STATEMENTS AND REMARKS.

From the time when the controversy, which is the subject of this arbitration, assumed the form of treaty engagements between the United States and Great Britain, it became a matter that invoked the sovereign powers of both Governments, and the rights of the United States and of the subjects of Great Britain were merged in those of each sovereign, as they are fixed by that treaty.

Each Government, in its own way, and according to its own will, without legal responsibility to its citizens or subjects, undertook to control the entire subject in its capacity as a sovereign. These powers were exerted in their broadest form in the *modus vivendi* of 1891, which was fully executed, and in that of 1892, which is made a part of the Treaty of February 29, 1892. In the creation of this Tribunal of Arbitration, and in the definition and limitation of its powers, this arrangement was continued in force. It results from this attitude of the two Governments toward the fur-seals referred to in the treaty that any dealing with them on the high seas by any person lawfully bearing the flag of either Government is an act for which that Government must be responsible to the other Government if any question of responsibility arises.

It was quite as competent for the two Governments to prohibit the taking of fur-seals as far to the south as the equator as it was to prohibit it in Bering Sea, so far as their citizens or subjects are concerned; and it was as competent for them to make the prohibition perpetual as it was to confine it to two or more fishing seasons. The two Governments forebore to prohibit pelagic sealing in the North Pacific Ocean pending this arbitration, in the evident hope and belief that the award in this case would be made in time to prevent any seriously mischievous effects of that pursuit, by a decision that would settle the

question whether the right and duty of protecting seal life would rest exclusively with the United States, or would require to be accomplished through the concurrent action of both Governments.

No power was conferred on this tribunal to protect the seal herd, the preservation of which is the great leading purpose of the arbitration, while the proceedings are in progress. The result is that unrestrained pelagic fur-sealing is now being carried on in the North Pacific Ocean, and if the experiences of the years 1891 and 1892 are repeated in 1893, the destruction of the species is now progressing with fatal rapidity.

In view of these facts, it is of vital importance that the humane and wise purpose of both Governments to preserve and protect these fur-seals should not be defeated by any objection to the jurisdiction of this tribunal that is based on technical grounds, and is held back by the objector to meet the views of counsel, or others, upon a question of the order of our proceedings. Especially is this true when one of the Governments is solemnly denying to this tribunal the right to consider a vital feature of the subject submitted to the tribunal, which the other government, with equal force and firmness, asserts to be clearly within their competency. Under such conditions no one can foretell with certainty whether the award that this tribunal shall make will result in protecting and preserving seal life, or will only invite, hereafter, a wider and more determined controversy between the two Governments.

For my part I regard the present situation as being dangerous and deplorable, and I most earnestly desire that this tribunal shall, in the outset, determine its responsibilities and meet them in whatever way it may think its duties require.

To relieve this embarrassing situation Mr. Justice Harlan has offered the following motion:

Mr. Justice Harlan moved that the tribunal, before entering upon the matters submitted by the treaty, determine its competency so far as it may be involved in the following questions:

1. Is it competent, under the treaty, for this tribunal to prescribe regulations applicable to such parts of the North Pacific Ocean, outside the jurisdictional limits of the two Governments, as are traversed by the seals frequenting the Pribilof Islands, if, upon the facts, regulations of that character are necessary "for the proper protection and preservation of the fur-seal in, or habitually resorting to, Behring Sea."

2. Is it competent, under the treaty, for the tribunal to prescribe regulations for a "closed season" covering such waters of both Behring Sea and the North Pacific Ocean, outside the jurisdictional limits of

the two countries, as are habitually traversed by these fur-seal, and embracing the months during which fur-seal may be taken in the open seas, and during which "closed season" all hunting of seals in such waters shall be forbidden, provided the facts show that regulations of that character are necessary "for the proper protection and preservation of the fur-seal in, or habitually resorting to, Behring Sea."

The motion of Mr. Justice Harlan that I have just read was submitted to the Tribunal of Arbitration on Saturday, July 15, at the first meeting of the Arbitrators for consultation, after the close of the oral arguments of counsel.

This motion relates to two disputed questions as to the powers of the tribunal, which were raised and formally presented by the Government of Great Britain, in its counter case, on February 3, 1893, as follows (page 162):

The position here taken on the part of Great Britain is that already taken in the original case. It is there stated:

"Finally, that while Great Britain has from the first strenuously and consistently opposed all the foregoing exceptional pretensions and claims, she has throughout been favorably disposed to the adoption of *general* measures of control of the fur-seal fishery should these be found to be necessary or desirable with a view to the protection of the fur-seals, provided that such measures be equitable and framed on just grounds of common interest, and *that the adhesion of other powers* be secured as a guaranty of their continued and impartial execution."

For the correspondence on this point the Arbitrators are respectfully referred to the appendix to the United States Case.

A claim is made in the concluding words of the United States Case that such regulations be "prescribed by this high tribunal as will effectually prohibit and prevent the capture anywhere upon the high seas of any seals belonging to the said herd."

Her Majesty's Government respectfully protests that no power to impose on the contracting parties a total prohibition of pelagic sealing is conferred on the tribunal by the arbitration treaty, whether the assent of other nations be or be not made a condition of such prohibition.

Article VII empowers the Arbitrators to "determine what concurrent regulations outside the jurisdictional limits of the respective governments are necessary, and over what waters such regulations should extend."

The power thus conferred relates to the only area in dispute, viz, the waters of Behring Sea eastward of the line of demarcation specified in the Treaty of Cession of 1867, and excludes the supposition that prohibition could have been intended.

I have copied the full statement of the British Government as to its position on this subject, both in the Case and Counter Case, that we may have the whole subject before us in the connected form in which it is thus presented in the British Counter Case.

It will be seen that Great Britain in stating its objections and pro-

test against the existence of these powers under the treaty of February 29, 1892, and their exercise by the Tribunal of Arbitration, makes no reference to anything except the text of the treaty. No ambiguity in any part of the treaty is suggested and, consequently, Great Britain had no occasion to go outside of the text of the treaty in order to present distinctly the grounds of objection to the power of this tribunal to make such regulations as are stated in the foregoing extracts from the British counter case. This tribunal must for that reason, and for every reason that could exist in respect to its warrant of authority to take any valid action in this proceeding, look to the text of the treaty alone for its powers.

There is, then, no occasion for delay in responding to the objection and protest of Great Britain as above stated, for it is not possible that any further facts can be presented that would throw any light upon the subject.

This challenge of the powers and authority of the Tribunal of Arbitration, and this protest against their action in determining any regulations to restrain, or prohibit, pelagic fur-sealing outside the waters of Bering Sea, was not presented as a diplomatic question to the Government of the United States, but is now for the first time presented as a protest to the tribunal, to warn it against the usurpation of unwarranted powers, and a statement that the powers mentioned in the protest are not conferred upon the tribunal.

Under no circumstances is it to be assumed that these objections to the powers of the tribunal are lightly suggested to excite inquiry or to awaken the attention of the tribunal, coming as they do from a most enlightened and powerful Government, or that their effect will not be felt in subsequent inquiries by Great Britain into the question whether the tribunal has acted *ultra vires*, if its award should injuriously affect the interests of the subjects of Great Britain. Moreover, these objections and protests were repeated in the most earnest way by the attorney-general of Great Britain, and by each of the able counsel who assisted him, in the written and oral arguments made before the tribunal. It is not necessary to call attention, in detail, to these arguments, for the record of them is preserved, and their ability and learning is so conspicuous that their influence can not be ignored.

These objections to the powers of the Tribunal, as to the regulation of pelagic sealing, were first taken in the British Counter Case.

In the original Case, on page 160, in paragraph 19 of the "Recapitu-

lation of Argument," the following is the position taken by the British Government:

19.—No regulations affecting British subjects can be established for the protection and preservation of fur-seals in the nonterritorial waters of Bering Sea without the concurrence of Great Britain.

That statement is quite in line with the power of this Tribunal to declare either that it accorded with the legal rights of British subjects, or that it did not. That was not an assault on the powers of the Tribunal, but a strong appeal to its judgment on an alleged right of British subjects.

The other statement on this subject, found in the British Case, I have already quoted, but will repeat. It is taken from an outline of argument on page 9, and is as follows:

Finally, that while Great Britain has from the first strenuously and consistently opposed all the foregoing exceptional pretensions and claims, she has throughout been favorably disposed to the adoption of *general* measures of control of the fur-seal fishery, should these be found to be necessary or desirable with a view to the protection of the fur-seals, provided that such measures be equitable and framed on just grounds of common interest, and *that the adhesion of other powers* be secured as a guarantee of their continued and impartial execution.

The objections raised in the British counter case (above cited) to the jurisdiction of the Tribunal of Arbitration are far more urgent in their demand for diplomatic settlement than the question, that was settled in that way, relating to the matter of the determination of Great Britain to abide by and perform the award of the tribunal.

If, however, the Tribunal of Arbitration shall determine to proceed to a final award without referring this vital question, as to their powers, to the two Governments for their further consideration they must incur the risk of having their award repudiated by the one Government or the other.

The case of the United States is based in a large part, if not most largely, upon the fact that the Tribunal of Arbitration has the powers that are indicated in the two propositions stated in the motion of Mr. Justice Harlan. Much more than half of the testimony offered and cited by the counsel for the respective Governments was adduced in elucidation of the subject of the regulations that are proper for the protection and preservation of fur-seals in the North Pacific Ocean. It is, taken together, an immense mass of facts and expert opinions.

The argument of counsels on the part of the United States were addressed at great length and with untiring industry and the highest

ability to point out the powers of this tribunal to regulate pelagic fur-sealing in the North Pacific Ocean and in Bering Sea. No motion was made or intimated on the hearing that this tribunal should refuse to admit such evidence on the ground that it had no jurisdiction to make regulations to protect and preserve the fur-seals in the North Pacific Ocean.

After all this, is it a reasonable expectation that the United States will accept an award that ignores the greater part of its case? Can we assume that the United States has consented to a treaty, and made this earnest effort to present its rights in accordance with it, and will be content that this tribunal shall find that it has no power even to consider those rights?

Moreover, we are called upon to decide that the powers of the tribunal to regulate pelagic sealing are confined to the area of Bering Sea; and to base that finding on the alleged fact that this is "the only area in dispute." To find this alleged fact we are invited to quit the text of the Treaty and to go into the diplomatic correspondence that led to its adoption for our authority so to construe that instrument. That process of construction might be adopted by this tribunal as a means of clearing up an ambiguous expression in the Treaty, under which a right is claimed in favor of either party, but no such proceeding can be resorted to in order to limit or enlarge our powers as a Tribunal of Arbitration. That would be to make a treaty by construction, and then to proceed to administer rights under it.

Much less can this tribunal create its powers by merely declaring them. Our powers are to be found in the clear meaning of the text of the treaty, or they do not exist. If we find them in the treaty we can not refuse to exercise them.

I will not now present an argument in support of the existence of the powers stated in the motion of Mr. Justice Harlan further than to make some quotations from the text of the treaty, premising that I understand it to be fully admitted on all hands that a great and leading purpose of both governments in making this treaty is to protect and preserve the fur-seals in, or that habitually resort to, Bering Sea.

The fur-seals to which this treaty relates comprise a family or herd of animals that are in Bering Sea, or habitually resort to those waters and the islands in that sea. As the protection and preservation of these animals is the real result sought to be accomplished by the treaty, the only accurate method of defining the scope of the powers

of this tribunal for their protection, as to its application, was to describe the herd; but the restrictions upon the limits of the jurisdiction are defined by the territorial boundaries of the two countries that own all the shores and islands that are washed by the waters in which these animals are found that resort to Bering Sea.

In the light of these facts, disclosed on the face of the treaty, the following quotations from the treaty make it clear that this tribunal possesses the powers stated in the motion of Mr. Justice Harlan:

ARTICLE I.

The questions which have arisen between the Government of Her Britannic Majesty and the Government of the United States concerning the jurisdictional rights of the United States in the waters of Bering Sea, and concerning also the *preservation of the fur-seal in or habitually resorting to the said sea, and the rights of the citizens and subjects of either country as regards the taking of fur-seal in or habitually resorting to the said waters*, shall be submitted to a tribunal of arbitration, to be composed of seven arbitrators.

* * * * *

ARTICLE III.

The printed case of each of the two parties, accompanied by the documents, the official correspondence, and the evidence on which each relies, shall be delivered in duplicate to each of the arbitrators and to the agent of the other party as soon as may be after the appointment of the members of the tribunal, but within a period not exceeding four months from the date of the exchange of the ratifications of this treaty.

ARTICLE IV.

Within three months after the delivery on both sides of the printed case either party may, in like manner, deliver in duplicate to each of the said arbitrators and to the agent of the other party a counter case and additional documents, correspondence, and evidence, in reply to the case, documents, correspondence, and evidence so presented by the other party.

* * * * *

ARTICLE VI.

In deciding the matters submitted to the arbitrators it is agreed that the following five points shall be submitted to them, in order that their award shall embrace a distinct decision upon each of said five points, to wit:

1. What exclusive jurisdiction in the sea now known as the Behring Sea, and what exclusive rights in the seal fisheries therein, did Russia assert and exercise prior and up to the time of the cession of Alaska to the United States?

* * * * *

5. Has the United States any right, and, if so, what right, of protection or property in the fur-seals frequenting the islands of the United

States in Behring Sea when such seals are found outside the ordinary 3-mile limit?

ARTICLE VII.

If the determination of the foregoing questions as to the exclusive jurisdiction of the United States shall leave the subject in such position that the concurrence of Great Britain is necessary to the establishment of Regulations for the proper protection and preservation of the fur-seal in, or habitually resorting to, the Behring Sea, the Arbitrators shall then determine what concurrent Regulations outside the jurisdictional limits of the respective Governments are necessary, and over what waters such Regulations should extend, and to aid them in that determination, the report of a Joint Commission, to be appointed by the respective Governments, shall be laid before them, with such other evidence as either Government may submit.

The High Contracting Parties furthermore agree to coöperate in securing the adhesion of other Powers to such Regulations.

ARTICLE IX.

Each Government shall appoint two Commissioners to investigate, conjointly with the Commissioners of the other Government, all the facts having relation to seal life in Behring Sea, and the measures necessary for its proper protection and preservation.

The four Commissioners shall, so far as they may be able to agree, make a joint report to each of the two Governments, and they shall also report, either jointly or severally, to each Government on any points on which they may be unable to agree.

These reports shall not be made public until they shall be submitted to the Arbitrators, or it shall appear that the contingency of their being used by the Arbitrators can not arise.

ARTICLE XIV.

The High Contracting Parties engage to consider the result of the proceedings of the Tribunal of Arbitration as a full and final settlement of all the *questions* referred to the Arbitrators.

MODUS VIVENDI OF 1892.

ARTICLE I.

Her Majesty's Government will prohibit, during the pendency of the arbitration, seal killing in that part of Behring Sea lying eastward of the line of demarcation described in Article I, of the Treaty of 1867 between the United States and Russia, and will promptly use its best efforts to ensure the observance of this prohibition by British subjects and vessels.

ARTICLE II.

The United States Government will prohibit seal killing for the same period in the same part of Behring's Sea and on the shores and islands thereof the property of the United States (in excess of seven thousand five hundred to be taken on the islands for the subsistence of the natives), and will promptly use its best efforts to ensure the observance of this prohibition by United States citizens and vessels.

ARTICLE III.

Every vessel or person offending against this prohibition in the said waters of Behring Sea outside of the ordinary territorial limits of the United States may be seized and detained by the naval or other duly commissioned officers of either of the High Contracting Parties, but they shall be handed over, as soon as practicable, to the authorities of the nation to which they respectively belong, who alone shall have jurisdiction to try the offence and impose the penalties for the same. The witnesses and proof necessary to establish the offence shall also be sent with them.

ARTICLE V.

If the result of the arbitration be to affirm the right of British sealers to take seals in Behring Sea within the bounds claimed by the United States under its purchase from Russia, then compensation shall be made by the United States to Great Britain (for the use of her subjects) for abstaining from the exercise of that right during pendency of the arbitration, upon the basis of such a regulated and limited catch or catches as in the opinion of the arbitration might have been taken without an undue diminution of the seal herds; and, on the other hand, if the result of the arbitration shall be to deny the right of British sealers to take seals within the said waters, then compensation shall be made by Great Britain to the United States (for itself, its citizens, and lessees) for this agreement to limit the island catch to seven thousand five hundred a season, upon the basis of the difference between this number and such larger catch as in the opinion of the Arbitrators might have been taken without an undue diminution of the seal herds.

There are no italics in the text I have just quoted. The regulations proposed by the United States for adoption by the Tribunal of Arbitration are in keeping with the suggestions contained in the motion presented by Mr. Justice Harlan; but, while the British Government denies to the tribunal the powers therein stated, the regulations offered by that Government for our adoption would necessarily depend on the assertion of the same powers.

They are as follows, the regulation numbered 8 having been presented to the tribunal and then withdrawn:

REGULATIONS.

1. All vessels engaging in pelagic sealing shall be required to obtain licenses at one or other of the following ports:
 Victoria, in the province of British Columbia.
 Vancouver, in the province of British Columbia.
 Port Townsend, in Washington Territory, in the United States.
 San Francisco, in the State of California, in the United States.
2. Such licenses shall only be granted to sailing vessels.
3. A zone of " " miles around the Pribilof Islands shall be established, within which no seal hunting shall be permitted at any time.
4. A close season from the 15th of September to the 1st of July shall

be established, during which no pelagic sealing shall be permitted in Behring Sea.

5. No rifles or nets shall be used in pelagic sealing.

6. All sealing vessels shall be required to carry a distinguishing flag.

7. The masters in charge of sealing vessels shall keep accurate logs as to the times and places of sealing, the number and sex of the seals captured, and shall enter an abstract thereof in their official logs.

8. Licenses shall be subject to forfeiture for breach of above regulations.

Whence comes the power of this tribunal, asserted in this programme, to bind Great Britain and the United States to enact laws requiring all vessels engaged in pelagic sealing to obtain licenses at *one or the other* of the following ports, viz: Victoria, Vancouver, Port Townsend, and San Francisco? All of these are seaports on the Pacific Ocean, and San Francisco is below the waters in which fur-seals are found or hunted.

To make this regulation the tribunal must go 2,000 miles south of Behring Sea, with its authority, and enter the seaports of both Governments.

Our authority, thus conceded, to make regulations to protect and preserve the fur-seals in or habitually resorting to Bering Sea, must not only enter within the ordinary 3-mile limit of each of these sovereign powers, under this programme, but, while there, it must destroy the pelagic hunting rights of all owners of steam vessels and all the persons who hunt seals in canoes, by denying to them a license for pelagic sealing. We must, while in these ports, disarm pelagic seal hunters of rifles and nets while leaving to the licensees the use of the deadly double-barreled shotguns, repeating pistols, and swivels. While there we are expected to regulate navigation by creating a new international flag for the benefit of the four ports that are given the monopoly, by these proposed regulations, of outfitting all licensed sealers and, consequently, of handling the great spring catch.

Then when we are engaged in establishing a close season during which no pelagic sealing shall be permitted in Bering Sea, we must also fix the boundaries of that sea, not yet fixed by any law or treaty. Otherwise, we can not define the boundary that shall separate innocence from guilt in pelagic sealing.

Inside Bering Sea, we must fix and demark a zone of 20 miles around the Pribilof Islands within which the seals shall live and pelagic sealing shall perish.

None of these various regulations—which would destroy some private

rights of the people and build up others; would create monopolies for some towns, to the great disadvantage of others; would build up some railroads and cripple others—are so clearly within the power of this tribunal to protect and preserve the fur-seals as the determination of a close season in the Pacific Ocean, or of the prohibition of all pelagic sealing would be.

The British Government, through its attorney-general, can give authenticity to any plan we may adopt for carrying out the purposes of the treaty, so as to bind that Government at least, and although the regulations thus presented to the tribunal may involve an award by the tribunal that would be *ultra vires*, if they should be adopted, the award would have the valid and binding consent of Great Britain. The United States can not be thus pledged to any consent decree and must accept what we award without question, except that the tribunal must act within its just powers under the treaty.

The regulations thus authentically proposed by Great Britain, being entirely inconsistent with its contention that the powers of this tribunal are confined to the area of Bering Sea, it is justly to be considered that the objection to the exercise of a more extended field of jurisdiction is waived, or abandoned, by that Government.

The examination and decision of the questions of the right of property in the fur-seals in, or habitually resorting to, Bering Sea, and the right to protect them claimed by the United States necessarily extends the jurisdiction of this tribunal on that question to the North Pacific Ocean.

In every important feature the case is an entirety, and all its parts must be construed in *pari materia*. It is beyond my comprehension that the jurisdiction of the tribunal should require us to make an investigation into a great variety of facts and the laws governing the rights of the United States as to property and protection in the Pacific Ocean, and that, when the protection of its rights is reached, the jurisdiction of the tribunal should suddenly cease.

Yet, if the objection of Great Britain is still urged, it is apparently the only method of avoiding a very embarrassing condition, that the Tribunal of Arbitration should present to both Governments the present attitude of the question and ask them, by a formal agreement, to remove the difficulty.

Mr. Justice Harlan and myself have stated to the tribunal our conviction that the United States would regard the decision of the tri-

bunal as being in violation of the plain provisions of the treaty if they should hold that they have no power under the treaty to extend whatever regulations they may find to be necessary for the proper protection of the fur-seals into the Northern Pacific Ocean.

As we fully concur in that view of the treaty and believe that the seal herd will be speedily destroyed if proper regulations for their protection in Behring Sea and in the North Pacific Ocean are refused, we feel compelled to seek a full opportunity to present the subject to our colleagues without the embarrassment that must attend its investigation in the presence of a pending and undecided objection on the part of Great Britain that we have no right to consider the subject of regulations applicable to the North Pacific Ocean, because this tribunal has no power to award any regulations to apply outside the area of Behring Sea.

We believe that the proper way and, indeed, the only way to secure an unembarrassed consideration of this subject on its merits is to take up the objection of Great Britain to the jurisdiction of this tribunal and dispose of it. I believe that every consideration of just and proper procedure in this case requires that this vital question as to the powers of this tribunal should be disposed of before any other question in the case is taken up. The questions of extending regulations beyond the area of Behring Sea into the North Pacific Ocean and of prohibiting pelagic sealing in Bering Sea can never be fairly considered upon their merits under the pressure of a pending objection made by Great Britain that, whatever convictions an Arbitrator may have as to the necessity of such regulations, the treaty forbids such action by the Tribunal of Arbitration.

The justice of the request that this question shall be disposed of *in limine*, aside from its logical propriety, is manifest, when it is considered that Great Britain has made this serious objection to the powers of the tribunal and yet insists that its objection shall not be heard until the case has been heard and decided, in all other respects, upon the merits.

Can it be justly claimed that, if the case should be decided in favor of the contention of Great Britain on every other point, on the merits, that Government could at its pleasure, permit or prevent regulations from being adopted applicable to the North Pacific Ocean, however necessary they may be, on the ground taken in its objection to the jurisdiction of this tribunal that it has no power under the treaty to make such regulations?

It should be determined, now, whether, in the judgment of this tribunal, a power of this dangerous magnitude can be wisely or justly left in the control of either party.

If this power to extend regulations to include an area in the North Pacific Ocean does not exist, as Great Britain asserts that it does not exist, no concession on the part of that Government could create the power, without the consent of the United States. It would require a change in the treaty to create that power if it does not exist.

The only ground that can be taken, in the situation presented by the objection of Great Britain, is that the Tribunal of Arbitration will decide the question and leave it to the respective Governments to determine what course they will pursue in view of the decision. It will result in this, at last, for they are sovereign Governments and there are none who can compel either of them, by any peaceful means, to accept and perform an award which they may believe violates the treaty under which this tribunal is acting.

I disclaim all authority to speak for the United States and I deny the right of any other person to bind that Government by any declaration or act that is not clearly authorized by the treaty.

I only speak for myself when I state my conviction, that the objection urged by Great Britain to the power of this tribunal to make regulations to protect the fur-seals, which shall have full operation outside of Bering Sea, if it is sustained by this tribunal, will destroy a leading and most important feature of the treaty.

From some observations of Lord Hannen, when Mr. Justice Harlan presented the propositions I have been discussing, I find that his objection to the second proposition is to some extent based on the point that there is in that proposition a delimitation of the area of waters in the Pacific Ocean, over which the regulations, if adopted, will extend. I understand Mr. Justice Harlan to say that such is not his intention, or his construction of that resolution.

Now, in order that the question of the power of the tribunal to make regulations that will extend to the Pacific Ocean, outside of Bering Sea, and outside of territorial limits, may be presented in a more distinct form, if possible, I will offer the following as a substitute for the two propositions offered by Mr. Justice Harlan, which, I think, covers the substance of both the propositions he has offered, and I hope it may remove the objections that are made by Lord Hannen to the form of those propositions:

"This Tribunal of Arbitration is empowered by the treaty of February 29, 1892, between the United States and Great Britain, to determine what concurrent regulations are proper to be adopted and enforced by the action of the respective Governments, applicable to their respective citizens or subjects, outside of their respective territorial limits and outside of Bering Sea, for the protection and preservation of fur-seals in, or habitually resorting to, Bering Sea."

At the conclusion of the foregoing remarks Mr. Justice Harlan accepted this declaration, offered by Senator Morgan, as a substitute for those proposed by him, and moved the adoption of the same.

A QUESTION BEING UNDER DISCUSSION AS TO THE PROPER ORDER IN WHICH THE MATTERS SUBMITTED TO THE TRIBUNAL FOR EXAMINATION SHOULD BE TAKEN UP AND DISPOSED OF, AND AS TO THE GENERAL POWERS AND DUTIES OF THE TRIBUNAL, SENATOR MORGAN MADE THE FOLLOWING PRELIMINARY REMARKS TOUCHING THE SAME:

The subject with which the tribunal is to deal is a practical one of the highest importance. On the part of Great Britain a claim is asserted, as a sovereign power, on behalf of her subjects, to the right of pelagic hunting of fur-seals in, or habitually resorting to Bering Sea, in all the waters of the North Pacific Ocean that are not included within ordinary territorial limits, without any restriction, or qualification, as to the time, place, or manner of their destruction.

In the Case of Great Britain, as it is stated to the Tribunal of Arbitration in conformity with the requirements of the treaty, this claim is presented in the broadest form and the present method of pelagic hunting is justified as being within that claim of right, under international law.

Great Britain has cited the principles of international law, and certain analogies relied upon to support her case. The Government of the United States, under the same requirement of the treaty, has presented its case upon the law and evidence in like manner.

The claim of the United States is made in the name and on behalf of that Government, which asserts that it is the sovereign owner of the fur-seals that habitually resort to the waters of Bering Sea and to the islands within that sea that are east of the water boundary between Russia and the United States of America, and that it owns these fur-seals as property, as a source of revenue, and as an instrumentality of government.

In one aspect of this claim, the ownership of the animals is alleged to be complete. In another aspect, the alleged ownership is stated as a right to have and enjoy the usufruct of these seal herds, for the sup-

port of a legitimate industry established by the United States on the islands of St. Paul and St. George, in Bering Sea.

Two distinct "cases" are thus presented to the Tribunal of Arbitration for consideration and decision, and, while they are not consolidated, as cross actions are often set down by the courts as comprising one case, they are to be heard at the same time and the same evidence may be used.

Each "case" must stand upon its own merits, and it does not necessarily result that a decision in favor of either Government upon the case presented by it is a denial of all that is claimed in the case of the other Government.

While the award to be made by the Tribunal of Arbitration may affirm in whole or in part the claims so asserted by either Government, it is not a finding in the nature of a recovery of property or judgment for money, as damages or otherwise, in favor of either party as against the other, but is an assent by both to a settlement of controversies between them in accordance with the terms of the award which the Tribunal of Arbitration shall make. When the award is so made, the result is the same as if both Governments had stipulated in the Treaty, in terms, that which shall be expressed in the award. In this sense, and to this effect, whatever shall be declared in the award *will be a finding in favor of both Governments.*

No rule is given or intimated in the treaty to indicate whether the tribunal is to take the international law, or a just view of the comity of nations, or the peculiar relations of the two Governments to this subject, as a guide to their decisions, or whether the rigid rules of law, or equitable considerations are to govern, and whether the tribunal is held to an unbending rule of law, or whether there are exceptions to it growing out of long usage or governmental necessities which should qualify the right claimed by either party.

Another important consideration was in view when the treaty was made, namely, the necessity for a declaration on their part, reaching beyond the mere question of the interests of the United States and the subjects of Great Britain in the Alaskan herd of fur-seals, that the ultimate assertion of governmental control over the subject by all the countries to which fur-seals resort in their breeding season should be established by the consent of the United States and Great Britain.

It was a just expectation that all such countries would find, in the results of this investigation, sufficient reasons for adopting the rules,

or principles, that this tribunal would establish for the protection of fur-seals.

The destruction of the fur-seal species in the southern hemisphere, in a commercial sense, had already resulted from indiscriminate slaughter on land and sea. The slaughter had been conducted as a matter of right upon the idea that none of those countries had treated the fur-seals as domestic animals, or animals that were attached to the soil, or as domesticated animals entitled to protection as property, but had permitted them to be treated as wild animals, subject to capture by everyone at his pleasure. The people of the United States and of Canada, and of many other countries, had exercised this assumed right of capture of fur-seals in the Antarctic Seas until within a recent period.

After the southern herds had been virtually destroyed, the colonization of Europeans in extreme southern latitudes led to the investigation of this subject and the enactment of laws for the protection of fur-seals in the hope that their numbers could be thus restored. These efforts are most noteworthy in the British colonies of New Zealand and the Cape of Good Hope. These legislative provisions were tentative rather than conclusive in their operation upon the right of pelagic hunting, within the prescribed limits of protection, by the people of foreign countries. While foreigners were included in the general terms of the statutes enacted to protect fur-seals, room was left for the question whether they could be rightfully included within the protection of the international law if the pelagic hunters chose to make objection. In the absence of such statutes, the right of pelagic sealing was not questioned, except in seas and bays that were claimed as being closed for such purposes, such as Behring Sea, the sea of Okhotsk, and the waters in and around the Japanese archipelago.

By insisting upon peculiar rights and powers of protection over fur-seals in such waters Russia and Japan had, in a large measure, preserved their herds from destruction. But there was then, and until recently, no one to assert, in the name of any Government, that pelagic sealing was an invasion of national interests, or rights of property, in fur-seals. The question was not raised by any serious dispute, by other powers, of the right of protection of fur-seals as asserted by Russia; and her policy stood opposed to the alleged right, in a negative way rather than by an active assertion attended with serious controversy or force. Such respect was paid to her well-known attitude on the sub-

ject that no occasion offered to test the question whether a right of pelagic hunting existed, under the laws of nations, which was superior to Russia's right to protect the fur-seals against trespassers on the high seas, or within Bering Sea, when they were found more than 3 miles from her coasts and islands.

This question was never, in fact, raised in any practical way as a matter of international dispute, until the present controversy between the United States and Great Britain.

The question is, therefore, entirely new, without any actual precedent for its control, and also without analogy for its illustration, *because no other animals yielding valuable products to commerce have the habits of the fur-seal, and none are compelled by the necessities of existence to place themselves so entirely within the dominion of man.* This award, therefore, dealing with questions that are entirely new, will complete the treaty between these two great powers, and establish between them fixed rules of conduct in respect to the protection and preservation of fur-seals in waters outside the limit of the jurisdiction of the respective Governments. These rules will be a new compact of international agreement, based on rights and duties that are, as yet, without accurate definition and without regulation.

The interests of peace and good will being the great moving causes, and the benefit of mankind and the requirements of humanity being included in the results of this arbitration, it is seen at once that it was necessary and proper to entrust these great powers to a Tribunal of Arbitration having very broad discretion and liberty of action.

The proper understanding of the scope and purpose of this treaty is to be gathered, also, from the diplomatic correspondence that attended its negotiation, and from the various propositions and agreements that took final shape in the text of the treaty.

The agreement between the two Governments in the convention treats the preservation and protection of the seal herds in a broad and rational way, and assumes that both Governments will freely and cordially exercise their powers for that purpose.

This is not a controversy in which the award will fix the title to specific chattels in either of two claimants, or give compensation, in damages, as for the conversion of such chattels. It is not a lawsuit between the United States and Great Britain. There are no special issues joined between them. All the questions are put to the tribunal interrogatively, and the award will settle principles and regulations

that will need to be enforced by the concurrent action of the two Governments. There can not be any self-executing powers included in the award. The rights and duties that are ascertained by the award will remain to be enforced by the sovereign powers of the Governments concerned.

The right of property in a herd of seals within the meaning of this treaty can not depend on the question whether every animal of the herd was born on land belonging to the claimant. If this question could arise, in any practical sense, it could only arise between Russia or Japan and the United States, and not between Great Britain, claiming no seal herds, and the United States, that claims a herd that habitually resorts to the Pribilof Islands. The questions submitted in this treaty for arbitration do not hinge upon the place of nativity of individual seals, but relate to those seals that resort habitually as herds to the islands of the United States, and they turn upon that fact as to their identification. This question of the intermixing of the herds with those of Russia was not raised in the correspondence that led up to this treaty, nor is it referred to in the treaty, unless it is included in the inquiry as to the right of property in the seals. That inquiry relates to the right of property in the seals in, or resorting to, Bering Sea, without reference to the place of their nativity. If they have that habit, Great Britain and the United States have agreed in this treaty that such a resorting to Bering Sea is the fact that identifies them as the subject of the award to be rendered in this case.

If the award is that the United States have a property in the seals so resorting to Bering Sea, or found in that sea, it fully covers the question that the Arbitrators are required to settle on the subject of property in seals. If there are other questions beyond this as to the title of the United States to individual seals, while living, the decision of them does not fully dispose of any right claimed by Great Britain to kill them when found singly or in small parties far out in the Ocean; nor will it diminish any right claimed by the United States to protect and preserve them if they can be identified as belonging to the Alaskan herd, though they may have been born upon Russian soil.

All the rights claimed by the United States in this treaty relate to the protection and preservation of the lives of seal herds. All the rights claimed by Great Britain and so submitted for arbitration, relate solely to the right of the destruction of individual seal life in order to secure the pelts. There is no right of property in any single, *living* seal,

whether it is found on shore or swimming in the sea, that is in controversy between these Powers under the provisions of this treaty.

The controversy submitted to the Arbitrators is in respect to the preservation of an entire body of fur-seals. It is impossible that the Arbitrators could declare in favor of Great Britain, on the case here presented and upon the questions submitted in the treaty, that *living* seals found at sea are the property of that Government or of its subjects.

The case submitted by Great Britain is a general and special denial of all property in seals until they are killed. But the Arbitrators can make an award of the "rights of property" in a herd of living seals to the United States, because such rights are included in the submission and are claimed in the case of the United States.

The United States claim the property interest in the seals under this arbitration, not for their justification in destroying them at sea or on the land, but for the sole purpose of protecting them against pelagic hunting, while Great Britain denies all such property rights until the seals are killed, and claims the right to kill them anywhere that a British ship can lawfully go. And the treaty, being framed to settle these claims, on its face admits that, if the seals resort to Bering Sea, that fact presents fully and sufficiently the question of the property right on which the claim of the United States to protect and preserve the seals is to be founded, and leaves the question to be settled by the Arbitrators whether there is vested in the United States, as between these parties, a right of property in the seals that are in, or habitually resort to Bering Sea.

The distance of 150 miles from the eastern coasts of the North Pacific Ocean is the extreme limit, to the westward, of pelagic hunting in that part of the ocean that borders on the North American continent.

Between February and June, when the seals are approaching Bering Sea, the Japanese and Russian herds are moving along the coasts of Japan and Russia, not less than 6,000 miles away from the Alaskan herds. If any stray Russian or Japanese seals have found their way across the Pacific Ocean to the American coast and into the Alaskan herd, that fact could not affect any right of property that the United States may have in the body of the herd. And when that right of property is asserted for the protection and preservation of the estrays it is sufficient to justify all proper efforts and force that may be requisite to that end. Even though Russia or Japan may have a higher property

right than that of the United States in individual seals, yet, if their seals are gone estray and are found in the Alaskan herds, the United States, if they own those herds, or have the power to protect them, may also lawfully and justly protect the estrays against everybody except the owner.

Two questions of right are presented in point 5 of Article VI, viz: The right of property in the fur-seals and the right to protect them. These rights are not identical under all circumstances.

The right to protect property may exist in one who neither has nor claims to have any absolute ownership of the property, and this right has a peculiar force and value on the high seas, where the exposure of property to destruction is great and the persons are few who may be able to protect and preserve it. The right to protect property is an element of its ownership, but that right does not always depend on ownership. In this treaty care is taken to submit to the Arbitrators the separate rights of property and of protection as to the seals in or resorting to Behring Sea.

It must be admitted that these questions in all their bearings are entirely new. It is their novelty that has led to this Arbitration. If they had been capable of solution under the rules and precedents of international law it must be assumed that two great Governments, equally desirous to protect and preserve the fur-seals, would have readily agreed as to which of them was charged with or entitled to perform that duty. In the absence of such rules and precedents of international law it was wise and just to submit these questions, as new ones, to arbitration.

The fact that both Governments are required by the treaty "to cooperate in securing the adhesion of other Powers to such Regulations" as shall be established by the tribunal, is an indication that is really conclusive of the fact that they both expected that the award might be based on new principles or on newly stated exceptions to old rules. If the award could not properly be based on well-settled principles of international law, the reason for securing the adhesion of other powers would be obvious, whereas that would be an unnecessary act if the award could be based only upon the concrete principles of international law, for other nations must be understood as knowing and abiding by the international law. Why should they be asked to give their adhesion to an award that would hold the United States and Great Britain only to a faithful observance of international law?

This is a controversy between two Governments that hold a peculiar relation to the fur-seals in the eastern waters of the North Pacific Ocean. The peculiarities of that situation must, largely, control or modify the equitable rights of the parties in their dealings with the subject and in the establishment of regulations to secure their obedience to the rules of right and justice that pervade all laws.

The two Governments resorted to arbitration for the peaceful settlement of their controversy, because the strict and unbending rules of international law, or their meager treatment of such subjects, were not equal to the emergency of the case, nor offered a precedent for the satisfactory adjustment of the right claimed by the United States. The settlement of this matter does not, necessarily, establish any rule of international law, or declare any such rule. It will establish a rule, *inter partes*, which they, by agreement, may rescind at pleasure. It can only become a rule of international law by the general adhesion of other powers.

So, I hold that the duty is included within the scope of the powers of this tribunal to determine what are the just and equitable powers and rights of the respective Governments that should be exercised severally, or concurrently, in maintaining and executing the avowed purpose of both, to protect and preserve the fur-seals. The question of the right of property, or protection, has this relation, and none other, to the great and novel subject submitted to this tribunal.

OPINION DELIVERED BEFORE THE TRIBUNAL OF ARBITRATION
BY SENATOR MORGAN, JULY 20, 1893, AS TO THE PROPER TIME
FOR THE CONSIDERATION OF THE HISTORICAL QUESTIONS
SUBMITTED TO THE TRIBUNAL.

July 20, 1893, Mr. Morgan submitted the following answers to points 1, 2, 3, and 4, of Article VI of the treaty, for the consideration of the tribunal:

1. From the time that Russia first discovered and occupied Behring Sea and the coasts and islands thereof until she ceded a portion thereof to the United States she claimed the seal fisheries in Behring Sea, and exercised exclusively the right to the usufruct and to own the product of such seal fisheries, and to protect the same against being interfered with in those waters by the people of any other country; and also the exclusive jurisdiction that was found necessary for those purposes; and also the exclusive jurisdiction to regulate the hunting of fur-seals in those waters and to grant the right of hunting them to her own subjects.

2. The attitude of Russia toward the fur-seal fisheries in Behring Sea, as described above, being known to Great Britain, she acquiesced in the same without objection.

3. The rights of Russia, as above stated, remained unaffected by the treaty of 1825 between Russia and Great Britain, and were held and exclusively exercised by Russia after the date of said treaty as they were before said date. The phrase "Pacific Ocean," as used in said treaty, did include the body of water now known as Behring Sea.

4. All the rights of Russia, as described in point 4 of Article VI of the treaty of February 29, 1892, passed unimpaired by the treaty of March 30, 1867, between Russia and the United States.

The following statements submitted to the tribunal by Lord Hannen and by Baron Courcel, respectively, while coinciding in the same findings as to the conclusions drawn from the facts of history, differ as to the facts upon which their respective conclusions are rested.

STATEMENT BY LORD HANNEN, SUBMITTED JULY 21, AS ANSWERS TO
QUESTIONS CONTAINED IN ARTICLE VI OF THE TREATY.

To question 1.—Russia never exercised exclusive jurisdiction in Behring Sea, outside the ordinary 3-mile limit. In 1821 she asserted exclusive jurisdiction over a part of Behring Sea, viz: For 100 miles along its coasts, by imperial ukase. But she withdrew the assertion of jurisdiction expressed in the ukase, on the demand of Great Britain and the United States, and never afterwards asserted or exercised such jurisdiction.

Russia never exercised exclusive rights in the seal fisheries in Behring Sea outside the aforesaid limit. In 1821 she claimed, by the aforesaid ukase, exclusive rights of all kinds (as included in her claim of jurisdiction), extending for 100 miles along the coasts of Behring Sea; but she withdrew the assertion on the demand of Great Britain and the United States, and never afterwards asserted or exercised such rights.

The only exclusive right which Russia subsequently exercised as to the sea was the ordinary right conceded by international law for 3 miles from land.

To question 2.—Great Britain never recognized or conceded any claims of Russia of jurisdiction as to the seal fisheries, except as to the ordinary 3-mile limit.

To question 3.—The body of water known as Behring Sea was included in the phrase "Pacific Ocean," as used in the treaty of 1825 between Great Britain and Russia.

Russia neither held nor exercised any rights in Behring Sea after the treaty of 1825, save only such rights as were allowed to her by international law within the ordinary 3-mile limit.

To question 4.—That Russia having had no rights as to jurisdiction or as to the seal fisheries in Behring Sea, except as to the lands ceded and the ordinary 3-mile limit bordering the same, it follows that no other rights passed to the United States under the treaty between the United States and Russia of March 30, 1867.

*STATEMENT PRESENTED BY BARON DE COURCEL, JULY 22, IN ANSWER
TO POINTS 1, 2, 3, AND 4 OF THE TREATY.*

I. The extent of authority asserted and exercised by Russia in Behring Sea, previously to the negotiations which led to the conclusion of the treaty of February 16-28, 1825, between Russia and Great Britain, does not appear with historical certainty, but it results from a dispatch of Count Nesselrode to Count Lieven, in date of St. Petersburg, the 26th of June, 1823, communicated to the London cabinet on the 14th of August ensuing, that the surveillance of the commanders of the Imperial Russian navy was to be exercised henceforth, under their instructions, in the region of Behring Sea over an extent of water that should be within cannon shot from shore; and although those instructions were stated as being provisional in the dispatch of Count Nesselrode, it does not appear that since that time up to the time of the cession of Alaska to the United States the Imperial Government of Russia exercised or asserted in Behring Sea, outside of the limit aforesaid, any exclusive jurisdiction either of a general character or in connection with the seal fisheries.

II. Great Britain has not recognized or conceded any jurisdiction of Russia as to seal fishery beyond the limit of territorial waters.

III. The body of water now known as the Behring Sea was included in the phrase "Pacific Ocean," as used in the treaty of 1825 between Great Britain and Russia, and after said treaty Russia neither held nor exercised in the Behring Sea, outside of territorial waters, any exclusive rights.

IV. All the rights of Russia as to the jurisdiction and as to the seal fisheries in Behring Sea east of the water boundary in the treaty between United States and Russia of the 30th of March, 1867, passed unimpaired to the United States under that treaty.

These variances, if not disagreements, as to the historical inquiries submitted to the tribunal in the first four points of Article VI of the treaty, in my judgment, furnish a conclusive reason in support of a motion I intend to submit for the postponement of a vote on points 1, 2, 3, and 4 in Article VI of the treaty, until the tribunal shall have reached a conclusion as to the rights of the United States, as to property and protection in the fur-seals.

On July 22, when the subject of the answers to be made to points 1, 2, 3, 4, of Article VI of the treaty, was under consideration, I had the honor of submitting the following motion and remarks:

"I move that no decision be made upon the first four points in Article VI of the treaty, at this time, but that this historical matter be laid aside until the tribunal has considered and decided the legal questions submitted for award in the treaty, in whatever order may be adopted. I will state the grounds for this motion:

"Prior to March 30, 1867, Russia owned all the coasts and islands washed by the waters of Bering Sea, and yet owns all west of the water boundary fixed in her treaty of that date with the United States.

"Russia has the same rights of jurisdiction in the western portion of Bering Sea that the United States has in the eastern portion. If we could reach an agreement as to what those rights are it would be far better, if it was possible, that it should not be formulated into an award in the absence of Russia from this hearing.

"Russia alone can state what exclusive jurisdiction she asserted and exercised and what exclusive rights in the seal fisheries she asserted and exercised in the sea now known as Bering Sea prior to 1825, or since that date and until 1867, so far as such statements can affect or describe her attitude as a sovereign with reference to that sea and the surrounding coasts and the islands washed by its waters. These matters rest in intention and are established by assertion and are proven, where proof is needed, by the exercise of authority over Behring Sea and its islands and surrounding coasts, and, where the sovereign rights of Russia are challenged and put upon trial, Russia should be present if the decision is to have any bearing, immediate or remote, upon her rights or any effect on her sensibilities, so important to be regarded in the comity of nations.

"Russia has retained rights and interests in the fur-seals and fisheries of every kind in the western part of Bering Sea and on the coasts and

islands thereof, which are the same as to origin, assertion, and exercise, and as to all sovereign powers, as those that are claimed and exercised by the United States. Russia is still guarding her rights in the form and to the extent that she is making a claim or assertion of them with sedulous care, and Great Britain is actively engaged in treating with her for the definition and settlement of those rights. While treating with Russia she is arbitrating with the United States about the identical questions that equally concern both countries."

A main feature that seems to control the opinions of the Arbitrators in determining what are the rights of the United States is the action of Russia, its conduct in fact, as it is alleged, *pro* and *con*, in first asserting, and then abandoning the assertion that Bering Sea is *mare clausum*; in issuing her ukase in 1799 and abandoning some of its vital features and adding others by a later ukase in 1821; in wiping out all of the pretensions set up in both ukases by the treaty concluded with the United States in 1824 and with Great Britain in 1825; in instructing her minister at Washington to deliver to the United States an explanatory protocol, defining more clearly her construction of the treaty of 1824, which instructions were violated under impressions made upon him by the Secretary of State, and, after this was done, proceeding under the text of the treaty as if no qualifying statement would ever be relied upon by Russia; and in renewing her charter to the Russian American Company in 1831 with the same exclusive privileges as were granted to it in 1821. In the opinions of the arbitrators, now delivered, these questions, so closely related to the conduct of Russia for a period little short of a century, are dealt with and are to be decided by this tribunal.

Whether Russia had any right under international law, or any other law, to assert and exercise exclusive rights or exclusive jurisdiction in Bering Sea, can not alter the fact that she did, or did not, assert and exercise them. Neither can these facts be altered by Russia's constructive modification or abandonment of the attitude she had previously held to these subjects. The only question is, what did Russia intend to assert in respect to these matters, and whether she executed that intention in dealing with these subjects. In the opinions delivered, strict history, as to facts, seems to have received a coloring of legal and diplomatic opinion in the effort to ascertain what Russia did and intended to do, by first ascertaining what it was her duty to do under the international law and the comity of nations.

In my judgment, if Russia chose to violate the international law and to repudiate all comity, her attitude was not altered because it may have exposed her to unfriendly criticism provoked by the pressure of adverse interests on the part of the United States or Great Britain. At all events, any such departures of the tribunal from the strict duty of stating this history, confined to the subject of fur-seal fisheries in Bering Sea, without reference, deduction, conjecture, opinion, gloss, or comment, will only provoke the prompt dissent of Russia, or will cause Great Britain and the United States, whenever their policies so require, to declare that our decision is not warranted by the strict nature of the inquiry submitted to us, and is *obiter dictum*.

I consider it a happy circumstance that in the opinions delivered on this subject there is such contrariety and conflict that, if they are adhered to, we are obliged to show that a majority of the tribunal are unable to agree upon an identical answer as to the historical facts submitted for inquiry and decision in the first point and in the last clause of the third point of Article VI.

And inasmuch as an agreement of a majority of the tribunal as to the historical facts so required to be stated is the essential basis of the decision of the other matters presented in points 2 and 3, I respectfully insist that we have not been able to reach a decision upon them, and for this reason a majority of the tribunal can not actually decide the inquiry stated in points 1, 2, and 3 of Article VI.

The matters presented for historical inquiry and decision in points 1, 2, 3, and 4, of Article VI, relate only to a derivative right of the United States to the fur-seal fisheries, as they are termed, in Bering Sea, and the exclusive jurisdiction over that sea to control and protect such fisheries. These questions are presented and may be considered and decided, upon the facts and law that must control our decision, under the submission of questions of a judicial nature, in point 5, of Article VI, and in Articles I and VII of the treaty. In so considering and deciding them we need find no occasion to express, in our award, any conclusions that may impinge upon any right of Russia, or call it in question, or that may unnecessarily wound her sensibilities. It may also turn out that a final award will be reached as to the rights of property and protection claimed by the United States, or the rights of pelagic sealing claimed by Great Britain, based upon considerations entirely apart from any derivative rights of the United States that may have come to that Government from Russia.

At all events, the disagreements already developed among the members of the tribunal, as to the matters with which the interests of Russia are so closely bound up, admonish us that we should lay this matter aside until we have considered the subject before us under Article I, and point 5 in Article VI, Article VII, and any others that open up an inquiry into the juridical features of the questions that are submitted to the tribunal.

The opinion and summary of facts presented by Lord Hannen is concurred in by Sir John Thompson. The opinion of Marquis Visconti Venosta is concurred in by Mr. Gram. These opinions, whatever the conclusions of fact to be drawn from them may be, are not identical in statement or reasoning. In the absence of copies of these opinions, I am not able now to compare and contrast them as I would feel it my privilege to do. These opinions deal with the rights and conduct of Russia in different lights. I do not say that they purposely deal with the present rights of Russia, but that effect is unavoidable if any weight is to attach to our findings.

Four Arbitrators will agree upon these historical facts, if four agree to Lord Hannen's syllabus, while three dissent. This is not a secure basis of historical decision of facts that concern a living and great nation and her rights, in matters that are now the subject of her anxious care that are under diplomatic consideration in correspondence with Great Britain. An opposing view of this history, presented by me, has the concurrence of Baron de Courcel and Mr. Justice Harlan, to a considerable extent. There is a divided opinion in several directions, and this chapter of history, if it is written, will go forth encumbered with serious doubts and objections.

After further discussion, the answers to be made to the first four points in Article VI of the treaty were informally laid aside to enable Mr. Justice Harlan to formulate his answers.

THE TRIBUNAL HAVING AGREED TO CONSIDER THE FIRST FOUR POINTS STATED IN ARTICLE VI OF THE TREATY, IN CONNECTION, AS A GROUP OF QUESTIONS, SENATOR MORGAN SUBMITTED HIS VIEWS OF THE CLAIMS OF RUSSIA, AND OF THE UNITED STATES DERIVED FROM RUSSIA, UNDER THE TREATY OF 1867, AS THE SAME ARE PROPOUNDED IN THE TREATY OF 1892 IN THE WORDS FOLLOWING:

1. What exclusive jurisdiction in the sea now known as Bering Sea, and what exclusive rights in the seal fisheries therein did Russia assert and exercise prior and up to the time of the cession of Alaska to the United States?

2. How far were those claims of jurisdiction as to the seal fisheries recognized and conceded by Great Britain?

3. Was the body of water now known as the Behring Sea included in the phrase "Pacific Ocean," as used in the treaty of 1825 between Great Britain and Russia; and what rights, if any, in the Behring Sea were held and exclusively exercised by Russia after said treaty?

4. Did not all the rights of Russia as to jurisdiction and as to the seal fisheries in Behring Sea east of the water boundary in the treaty between the United States and Russia of the 30th March, 1867, pass unimpaired to the United States under that treaty?

As the tribunal seems to agree unanimously in giving an affirmative answer to the fourth point I will not discuss it.

A like unanimity seems to exist as to the answer to the first inquiry under question 3, which makes it unnecessary that I should comment upon that question.

All the questions submitted under the four points of Article VI are historical rather than judicial in their character as to the facts to be ascertained and as to the conclusions to be based upon them, except the question presented in the second point, which I consider a mixed question of law and fact. It is upon this view of the duty of the tribunal in the consideration of these questions that my opinions are rested.

The situation of the western and northwestern coast of North America in 1824 was practically that of an unoccupied and uninhabited country to the north of Puget Sound. A few scattered tribes of Indians inhabited the vast reach of coast, from San Francisco to the

frozen ocean, not less than 4,000 miles in length. The claims of Great Britain, Russia, Spain, and the United States to certain boundaries along this great reach were based on alleged discoveries and occupation, all of the most indefinite character, and all disputed, except that Russia held and occupied the islands and coasts on all sides of Bering Sea and this claim was not disputed by any country. This claim was thus held and recognized for many years before 1824, reaching back to the discovery and exploration of Bering Sea.

The interest of Russia in these wild and inhospitable regions was not agricultural, for they are unfit for such pursuits. It was not an ambitious desire for territorial aggrandizement on the American continent, for Russia took no steps to increase her population there beyond the numbers necessary to secure and handle the fur trade; and when she found it inconvenient to incur the expense of governing a colony so far away from her capital, that yielded so small a revenue, she sold all her possessions and dominion in that region east of 170° of west longitude to a power that had always been friendly and was not in any sense her rival.

Fishing was not so profitable in Bering Sea as to induce fishermen to encounter the unpleasant and short summer season when it was practicable to fish there and establish any regular business in taking fish. The markets were too distant to justify them to transport their catch fresh on ice, and there was not sufficient sunshine to enable them to properly cure the fish. In consequence the business of *fishing* was never permanently established in Bering Sea, and is not until this time.

Russia directed the energy and capital of her people *to the collection of furs* as the only really valuable industry in that region, and created monopolies in their favor and gave them large powers of legislation, *all directed to the same end*, and all protected by her naval power in a thoroughly systematic and effectual way.

These privileges were retained and exercised exclusively by Russian subjects under her laws until the Alaskan region was sold to the United States in 1867, with all the rights and dominion that Russia had therein. In order to extinguish in that region all claim of rights existing under Russian authority it was stipulated in the treaty of cession that all former grants of exclusive privileges to any of the Russian subjects should be abrogated.

It was in pursuance of the same authority and manifestly for these reasons that the right of trading with the natives and of taking and

collecting furs was withheld from the concessions made by Russia to Great Britain and the United States in 1824 and 1825.

In accordance with what was then the practice of the great powers as to the right of declaring the closure of extensive areas of sea as territorial appurtenances, Russia claimed that Behring Sea was *mare clausum*, and in practice this claim was carried into effect as to the control of the fur trade.

Her people did not hunt whales at that period to any great extent, nor did they conduct fisheries for commercial purposes. It was the double purpose of protecting her fur trade and yet permitting whaling and other fishing within safe limits that caused the Emperor, Alexander I, to issue the ukase of 1821. The whalers and fishermen had begun to deal with the natives for furs and to catch seals in Behring Sea. Russia resented this as a wrong and an invasion of her territorial rights, and the ukase was issued to prevent its increase or continuance.

The ordinary three-mile limit was as fully recognized then as it has been since that time, generally, as to coasts bordering the open ocean, or even more fully recognized. But Russia paid no attention to it in Bering Sea, and for her own security in respect of her only industry in those waters—the fur trade—and to keep down insurrection, she fixed a line of prohibition to navigators at 100 Italian miles from her coasts. In doing this, and in opening Bering Sea to whalers and fishermen and other navigators in the parts not included in the 100-mile limit, she asserted and exercised an exceptional jurisdiction over that sea and claimed that her power extended over the entire sea, but waived her rights at the distance of over 100 miles from the coasts.

In 1799 the interest of Russia and her subjects in the fur trade had become so important that on July 8, 1799, nearly twenty-five years before the date of the treaty with the United States of April, 5-17, 1824, the Emperor Paul issued his ukase, in which he declared that—

The benefits and advantages resulting to our Empire from hunting and trading carried on by our loyal subjects in the northeastern seas and along the coasts of America have attracted our Imperial attention and consideration; therefore, having taken under our immediate protection a company organized for the above-named purpose of carrying on hunting and trading, we allow it to assume the appellation of "Russian American Company, operating under our highest protection;" and for the purpose of aiding the company in its enterprises, we allow the commanders of our land and sea forces to employ said forces in the company's aid if occasion requires it, while for further relief and assistance of said company, and having examined their rules and regulations,

we hereby declare it to be our highest Imperial will to grant to this company for a period of twenty years the following rights and privileges:

I. By the right of discovery in past times by Russian navigators of the northwestern part of America, beginning from the fifty-fifth degree of north latitude and of the chain of islands extending from Kamtchatka to the north to America, and southward to Japan, and by right of possession of the same by Russia we most graciously permit the company to have the use of all hunting grounds and establishments now existing on the northeastern coast of America, from the above-mentioned fifty-fifth degree to Bering Strait, and also on the Aleutian, Kurile, and other islands situated in the Northeastern Ocean.

There could not have been a more distinct assertion of rights of sovereignty and dominion, in virtue of discovery and possession, than is made in this State paper. Neither could it have been more formally, or completely stated that the sovereign will and power of Russia was exerted by this Imperial ukase to secure to the "Russian-American Company under (Russia's) highest protection" "the benefits and advantages resulting * * * from the hunting and trading carried on * * * in the northeastern seas and along the coasts of America." There can be no reasonable doubt that this ukase covered Bering Sea and all hunting and trading in those waters. The rights conferred by this ukase were supported by the power of the army and navy of Russia, pledged for that purpose.

The exclusive character of these rights, as to all the world, is stated in Article X of the regulations embodied in this ukase, as follows:

X. The exclusive right is most graciously granted to the company for a period of twenty years, to use and enjoy, in the above-described extent of country and islands, all profits and advantages derived from hunting, trade, industries, and discovery of new lands, prohibiting the enjoyment of these profits and advantages not only to those who would wish to sail to those countries on their own account, but to all former hunters and trappers who have been engaged in this trade and have their vessels and furs at those places; and other companies which may have been formed will not be allowed to continue their business unless they unite with the present company with their free consent, but such private companies or traders as have their vessels in those regions can either sell their property or, with the company's consent, remain until they have obtained a cargo, but no longer than is required for the loading and return of their vessel; and after that nobody will have any privileges but this one company, which will be protected in the enjoyment of all the rights mentioned.

The rights thus exclusively granted relate to *hunting and trading*. The rights of free navigation and of fishing are not granted exclusively to this company, but "all profits and advantages derived from *hunting, trade, industries, and discoveries of new lands*" are so granted.

That the privilege of hunting fur-bearing animals in the northeastern sea, and on land, was "the exclusive right" of the greatest importance that was granted in this ukase is made entirely clear in the prohibition stated in Article X in these words, "prohibiting the enjoyment of these profits and advantages not only to those who would wish to sail to those countries on their own account, but to all former hunters and trappers who have been engaged in this trade and have their vessels and furs at those places."

This company conducted its operations in reference to the fur trade at great cost and with much profit during the twenty years of its chartered existence, and then applied to Russia for a renewal of its charter for an additional term of twenty years.

The ukase of 1790 *was found to be insufficient for the protection of the privileges granted by it*, and an additional ukase was necessary for that purpose, which was issued September 4, 1821. There could be no need to again assert the right of Russia to grant the exclusive privilege to its subjects of "*hunting and trading*," "which had been carried on by (her) loyal subjects in the northeastern seas and along the coasts of America" for many years anterior to 1790, and for a quarter of a century since that date; but Russia, through its Emperor and directing senate, in the most solemn manner, declared that the free right of navigation, *which was not restricted by the ukase of 1799*, had been abused, to the detriment of "the trade of our subjects on the Aleutian Islands and on the northwest coast of America, appertaining unto Russia."

This necessity for an additional ukase could not be expressed more distinctly, or more tersely, than it is in the terms of that ukase, which are as follows:

The directing senate maketh known unto all men: Whereas in an edict of His Imperial Majesty, issued to the directing senate on the 4th day of September, and signed by His Imperial Majesty's own hand, it is thus expressed:

Observing from reports submitted to us that the trade of our subjects on the Aleutian Islands and on the northwest coast of America appertaining unto Russia, is subjected, because of secret and illicit traffic, to oppression and impediments, and finding that the principal cause of these difficulties is the want of rules establishing the boundaries for navigation along these coasts, and the order of naval communication as well in these places as on the whole of the eastern coast of Siberia and the Kurile Islands, we have deemed it necessary to determine these communications by specific regulations, which are hereto attached.

In forwarding these regulations to the directing senate we command that the same be published for universal information, and that the proper measures be taken to carry them into execution.

That ukase is directed to the suppression of a "secret and illicit traffic" and "oppression and impediments" to which the trade of Russian subjects on the Aleutian Islands on the northwest coast of America was subjected. "The principal cause of these difficulties" is stated in the ukase. It "is the want of rules establishing boundaries for navigation along these coasts," not through Bering Sea, "and the order of naval communication as well in these places as on the whole of the eastern coasts of Siberia and the Kurile Islands."

In renewing the charter of the Russian-American Company in 1821, all these abuses were dealt with in the ukase, published on September 7, 1821. That was a complete code of laws consisting of 63 sections, regulating and setting apart, as an exclusive and additional right "granted to Russian subjects" of "the pursuit of commerce, whaling, and fishery, and all other industries on all islands, ports, and gulfs, including the whole of the northwest coast of America," from Bering Straits to the 51° of north latitude, and 45° 50' on the Siberian side of Bering Sea.

In this ukase, following this exclusive grant of rights and privileges to Russian subjects, section 2 ordains that:

It is therefore prohibited to all foreign vessels not only to land on the coasts and islands belonging to Russia as stated above, but also to approach them within less than a hundred Italian miles. The transgressor's vessel is subject to confiscation, along with the whole cargo.

The second charter of the Russian-American Company was based upon the ukase of 1821, which was based upon and amended the ukase of 1799. The first and second articles of that charter are as follows:

I.

The company established for carrying on industries and trade on the mainland of Northwest America, on the Aleutian and on the Kurile Islands remains, as heretofore, under the highest protection of His Imperial Majesty.

II.

It enjoys the privilege of hunting and fishing, to the exclusion of all other Russian or foreign subjects throughout the territories long since in the possession of Russia on the coasts of Northwest America, beginning at the northern point of the Island of Vancouver, in latitude 51° north, and extending to Bering Strait and beyond, as well as on all islands adjoining the coast and all those situated between this coast and the eastern shore of Siberia, as well as on the Kurile Islands, where the company has engaged in hunting, down to the south cape of the Island Urupa, in latitude 45° 50'.

The term "hunting" in Article II necessarily includes the same "hunting * * * carried on by our loyal subjects *in the northeastern seas and along the coasts of America*" that is reserved, exclusively, to Russian subjects by the ukase of 1799.

The right of fishing is not mentioned specifically in the ukase of 1799, for the reason, doubtless, that it then had no importance. It is specifically mentioned in the ukase of 1821, and is therein classed as follows, viz, "the pursuits of commerce, whaling, and fishery, and of all other industry on all islands, ports, and gulfs."

In the ukase of 1821 all these pursuits, including hunting in the northeastern seas, are embraced in "the trade of our subjects (who are) on the Aleutian Islands and on the Northwest coast of America appertaining to Russia," are covered by the protecting power of the Russian Empire. And in order to make the protection effectual the right of navigation was in that ukase restricted to 100 miles from the coasts, etc.

In 1824 the United States held the Spanish title to its possessions on the Pacific coast north of latitude 42°, and had no other substantial claim to that coast. In the treaty of 1824 between the United States and Russia nothing was settled that had not been claimed by Russia in these two ukases of 1799 and 1821, and in Article I of the treaty (the rights of) "the respective citizens and subjects of the High Contracting Powers" are "neither disturbed nor restrained either in navigation or in fishing, or in the power of resorting to the coasts, upon points that may not have been already occupied, *for the purpose of trading* with the natives, saving always the restrictions and conditions determined by the following articles."

Articles 2, 3, and 4 are as follows:

ARTICLE II.

With a view of preventing the rights of navigation and of fishing exercised upon the Great Ocean by the citizens and subjects of the high contracting powers from becoming the pretext for an illicit trade, it is agreed that the citizens of the United States shall not resort to any point where there is a Russian establishment without the permission of the governor or commander; and that, reciprocally, the subjects of Russia shall not resort without permission to any establishment of the United States upon the Northwest coast.

ARTICLE III.

It is moreover agreed that hereafter there shall not be formed by the citizens of the United States, or under the authority of the said States, any establishment upon the Northwest coast of America, nor in

any of the islands adjacent, to the north of fifty-four degrees and forty minutes of north latitude; and that, in the same manner, there shall be none formed by Russian subjects, or under the authority of Russia, south of the same parallel.

ARTICLE IV.

It is, nevertheless, understood that during a term of ten years, counting from the signature of the present convention, the ships of both powers, or which belong to their citizens or subjects, respectively, may reciprocally frequent, without any hindrance whatever, the interior seas, gulfs, harbors, and creeks upon the coast mentioned in the preceding article for the purpose of fishing and trading with the natives of the country.

This treaty was designed to settle all the questions involved in the ukases of 1799 and 1821, in which the United States *claimed any interest, under international law*, and there is no mention made of any change or modification of the exclusive right of the Russians (made so prominent in the ukase of 1799) of "hunting and trading carried on by our loyal subjects in the northeastern seas and along the coasts of America," except that the right of "trading with the natives of the country" is granted to Americans for ten years, and after that time they "shall not resort to any point where there is a Russian establishment *without the permission of the governor or commander.*"

Aside from the question whether "the Great Ocean" included Behring Sea, or is distinguished from it in the treaty of 1824, the right of "hunting in the northeastern seas and along the coasts of America," which, with the right of trading, was considered so replete with "benefits and advantages resulting to our empire," as to be made the sole grounds of the ukase of 1799, *was not touched by the treaty of 1824* with the United States, or the treaty of 1825 with Great Britain.

That right stands to-day as a right asserted by Russia and reserved out of all treaties with the United States and Great Britain.

That is quite a sufficient assertion of the right, to support a prescriptive title to the fur-bearing animals in Behring Sea.

The right of "resorting to the coasts, upon points which may not already have been occupied for the purpose of trading" which is agreed upon in Article I of the treaty of 1824 is altogether distinct from the right of *hunting* "in the northeastern seas" or along the coast.

The rights of "fishing" and "hunting" are not anywhere alluded to in these ukases or treaties as being the same; on the contrary, the right of hunting is reserved to Russian subjects "in the northeastern seas and along the coasts of America," while the treaty of 1824 forbids citi-

zens of the United States from resorting to the coast of Russia at any point where there is a Russian establishment without the permission from the governor or commander. Those were the points along the coasts where hunting was most profitable, where the fur-seals were mostly hunted, and where, for that purpose, Russian establishments were located.

If the "fishing" mentioned in the treaty of 1824 meant seal "hunting," why was this "hunting" or "fishing" forbidden to the people of

United States at the places where the Russians found it most profitable? The Indians at that time hunted seals in Bering Sea outside the limit of 3 miles from the coast, and the Russians hunted them on the Pribilof Islands. Why should American citizens be excluded from "hunting" seals on shore where the Russians had establishments and yet be admitted to the right of "fishing" for seals in the sea, "along the coasts" where the Indians "hunted" them? These words, "hunting" and "fishing," have each a natural and clear signification, which is most strongly emphasized in these ukases and in the treaty of 1824 as being entirely distinct, and there is no warrant in the context of either of these ukases, or treaties, or in the circumstances that led to them, for construing "hunting" and "fishing" as identical or synonymous terms.

The ratification of the treaty of April 5-17, 1824, with Russia was proclaimed on the 12th day of January, 1825. Until then it was not in force. As early as June 12, 1824, Baron Tuyl, Russian minister at Washington, was instructed by his Government "to the effect that the Northwestern Coast of America, along the extent of which, by the provisions of the convention, free trading and fishing are permitted subjects of the North American States, extends from 54° 40' northward to Yakutat (Behring) Bay."

The understanding of the treaty by Russia is in accord with the policy stated in the note of the minister of finance to Director Uvarov of April 2, 1824, in which it is ordered that "the carrying on of trade with foreign vessels arriving there (harbor of New Archangel, now Sitka) established regulations at one designated port."

A conference of Russian notables was held in St. Petersburg on July 21, 1824, by order of the Emperor, to "again examine" the effect of the treaty of April 5, 1824, upon Russian rights and interests, "and also the means which the Imperial ministry thinks best calculated to prevent all injurious and unjust interpretations."

In the fifth resolution of this conference it is claimed that the treaty secures to Russia this advantage, viz, "that after the expiration of ten years the subjects of the United States of America *will abstain entirely from visiting the waters of the North American coasts beyond 54° 40' and from fishing and from trading there with the native inhabitants.*"

The majority of the members of that committee stated as their opinion—

That the treaty of April 5-17 must be ratified, and that for the prevention of any incorrect interpretation of that act Gen. Baron Tuyl may be instructed at the proper time to make the declaration mentioned in the draft of the communication read by Count Nesselrode.

The minister of finance and Acting State Councillor Drushinin, while admitting the necessity of ratifying the treaty of April 5-17, express and place on record the special opinion hereto annexed in the protocol, to the effect that Baron Tuyl should be instructed at the exchange of the ratifications of that treaty to stipulate that the right of free hunting and fishing granted by the second article of the said treaty shall extend only from 54° 40' to the latitude of Cross Sound.

The majority of the members of the committee could not but observe, on the one hand, that as the Russian-American Company has founded many settlements in the said latitude, article 2 of the treaty of April 5-17, gives it the desired security on this subject; that even if it had simply organized hunting and fishing in those regions it is extremely doubtful whether American subjects would undertake the expense necessary for voyages to those Northern latitudes in which they can enjoy their privileges for only ten years, and whether in that case they would expose themselves to dangerous competition and would visit those waters for hunting and fishing where they had long been anticipated by the company, as there would be little hope for them of indemnifying themselves for their expenses and losses.

These proceedings show that the Russian claim at that time and under their construction of the treaty of April 5-17, 1824, was that the assertion of the exclusive right of fishing and hunting north of 59° 30' was reserved to Russian subjects even during the period of the privileges that were granted to United States citizens under article 4 of the treaty, for ten years.

This attitude of Russia towards the exclusive right to the fur trade in Bering Sea was maintained in practice down to 1867, no one objecting. The close care of the fur-seal industry on the islands, the policing of the seas for the protection of fur-bearing animals, the arrest of suspected or offending ships, and the basing of civilization and government on that traffic upon all her coasts and islands in Bering Sea by careful legislation, all prove that Russia admitted no common, or partnership rights of any people or government in any of those privileges

or industries. There is no evidence but the silence of other governments, if any objection to these claims of Russia existed.

In every stage of the negotiations between the United States and Great Britain and in every declaration of right by Russia, up to the exchange of ratifications of the treaties of 1824 and 1825, and in every declaration of Russia since that time, the protection and security of her fur trade in Bering Sea has been an object of her solicitude. Every governmental act instituted and performed by Russia in that connection has been exactly in correspondence with her assertion of *dominion* over Bering Sea as a *preserve* for taking furs through hunting "in the northeastern seas" and "in the gulfs" thereof, and of the South Sea, or Pacific Ocean, and along her coast line, south as well as north of the Aleutian Islands and peninsula.

It was this assertion of dominion that the United States and Great Britain yielded to when they, respectively, accepted the restrictions upon the rights of "fishing and trading with the natives," which are limited to the period of ten years, in Articles III and IV of the treaty with the United States, and Articles III and VII of the treaty with Great Britain.

In the treaty of 1824 with the United States, Articles III and IV are as follows:

III.

It is moreover agreed that, hereafter, there shall not be formed by the citizens of the United States or under the authority of the said States, any establishment upon the northwest coast of America, nor in any of the islands adjacent to the north of fifty-four degrees and forty minutes of north latitude; and that, in the same manner, there shall be none formed by Russian subjects or under the authority of Russia, south of the same parallel.

IV.

It is, nevertheless, understood that during a term of ten years, counting from the signature of the present convention, the ships of both powers, or which belong to their citizens or subjects respectively, may reciprocally frequent, without any hindrance whatever, the interior seas, gulfs, harbors, and creeks, upon the coast mentioned in the preceding article, for the purpose of fishing and trading with the natives of the country.

In the treaty with Great Britain, Articles III and VII are as follows:

III.

The line of demarkation between the possessions of the High Contracting Parties, upon the coast of the continent, and the islands of America to the northwest shall be drawn in the manner following:

Commencing from the southernmost point of the island called *Prince*

of *Wales* Island, which point lies in the parallel of fifty-four degrees and forty minutes north latitude, and between the one hundred and thirty-first and the one hundred and thirty-third degree of west longitude (meridian of Greenwich), the said line shall ascend to the north along the channel called Portland Channel, as far as the point of the continent where it strikes the fifty-sixth degree of north latitude; from the last-mentioned point the line of demarkation shall follow the summit of the mountains situated parallel to the coast, as far as the point of intersection of the one hundred and forty first degree of west longitude (of the same meridian); and finally from the said point of intersection, the said meridian line of the one hundred and forty first degree in its prolongation as far as the frozen ocean, shall form the limit between the Russian and British possessions on the continent of America to the northwest.

VII.

It is also understood that for the space of ten years from the signature of the present convention the vessels of the two powers, or those belonging to their respective subjects, shall mutually be at liberty to frequent, without any hindrance whatever, all the inland seas, gulfs, havens, and creeks on the coast mentioned in Article III, for the purpose of fishing and of trading with the natives.

If Great Britain had understood that the treaty of 1824 with the United States gave to their citizens the perpetual right of fishing and trading with the natives in "interior seas, gulfs, harbors, and creeks, upon the coast"—"the northwest coast of America"—and "in the islands adjacent" thereto, "to the north of 54° 40' north latitude," that Government would not have accepted a limitation of this right to a period of ten years. Under such a construction of the treaty of 1824 with the United States it would have been sheer folly for Great Britain to have given Russia the same privilege for ten years from Prince of Wales Island, along Portland Channel up to 56° of north latitude, for Great Britain asserted, with absolute confidence, that Russia would not make terms with her that were less liberal than she had made with the United States.

If Russia yielded her dominion over her preserve of fur-seal hunting in perpetuity to the United States, and then to Great Britain, what could have been the necessity that prompted them to insert these by-provisions for the same rights for a period of ten years in their treaties? It is too clear for disputation that Russia intended to yield these rights, reciprocally, for ten years, because she was not willing that they should extend beyond that period, except at her option. A more forcible statement of the claim of Russia to the exclusive right of fishing and trading with the natives in those waters could not well have been made.

Yet even these concessions did not include the right of "hunting" fur-bearing animals, *which Russia was never asked to yield*. For these purposes her dominion over Bering Sea and all the gulfs, bays, inland seas, and creeks on all her coasts was reserved.

The rights of whaling, fishing, hunting, and trading, conducting commerce and navigation, are all referred to in these ukases and treaties as separate and distinct rights. In their nature they are distinct, and none of them includes the others, though they are closely related. When each of these rights is expressly and distinctively mentioned in one part of these treaties and ukases, as a substantive right or pursuit, it is not a proper construction of these solemn instruments to say that those rights are intended to be included in those parts where they are not mentioned, or that "hunting" is telescoped into "fishing" and "fishing" into "whaling" and all of them into "navigation," or that the use of that word or the assertion of that right includes all these other rights.

Dominion of Bering Sea could have been exercised for the exclusive enjoyment and protection of either of those rights, without including any other, though, as in the case of the 100 miles limit, which was a modification of the claim of the exclusive right of navigation, the full exertion of that power would have closed that sea to all navigators whether they were whalers, fishermen, or hunters. The ukase of 1799 asserted this dominion, so as to protect the right of "hunting in the northeastern seas" and of trading with the natives, and no other ukase or treaty ever yielded the exclusive right of hunting, under any condition, or the right of fishing to any other extent, than under the ten years limit provided in the above-quoted articles of those treaties of 1824 and 1825.

Dominion in one country over land or sea, is entirely consistent with easement or privilege in another.

Navigation is a universal easement to be enjoyed by all vessels sailing on lawful voyages upon the high seas, but it has no element of dominion to support it, except within territorial waters. Fishing, lawfully conducted, is also an easement equally universal, and the right is also exclusive in territorial waters.

The dominion that protects fisheries is more exclusive than that which limits the free right of navigation. Within territorial limits, fishing is a *property right*, while navigation within those limits is, for innocent purposes, an easement that no nation denies to another.

Hunting is an easement that is still more under the control of national dominion, because it is conducted with firearms and is, therefore, a more dangerous practice where the people are savages or are rebellious, because it furnishes a pretext for introducing among them arms and ammunition. And hunting and trapping are different pursuits. Russia had powerful inducements for keeping hunting on land or sea and trading with the natives under her exclusive dominion.

What is dominion? Sir Robert Phillimore, in his "Commentaries on International Law, Vol. 1, p. 266, Ed. 1871, says: "Dominion is the fullest right which can be exercised over a thing: *the right of property, so called.*" On page 267 he says: "As dominion is acquired by the combination of the two elements of *fact* and *intention*, so, by the dissolution of these elements, or by the contrary fact and intention, it may be lost or extinguished."

On page 274 he says:

But when occupation by use and settlement has followed upon discovery, it is a clear proposition of law that there exists that corporal possession (*corporalis quaedam possessio* (a) *detentio corporalis* (b)) which confers an exclusive title upon the occupant, and the *dominium eminens*, as jurists speak, upon the country whose agent he is.

On page 285 he further says:

CXXLII. The nature of occupation is not confined to any one class or description; it must be a beneficial use and occupation (*le travail d' appropriation*); but it may be by a settlement for the purpose of prosecuting a particular trade, such as a fishery, or for working mines, or pastoral occupations, as well as agriculture, though Bynkershoek is correct in saying, *cultura utique et cura agri possessionem quam maxime indicat.*

Vattel justly maintains that the pastoral occupation of the Arabs entitled them to the exclusive possession of the regions which they inhabit.

It has been truly observed that, agreeably to this rule the North American Indians would have been entitled to have excluded the British fur-traders from their hunting-grounds; and not having done so, the latter must be considered as having been admitted to a joint occupation of the territory, and thus to have become invested with a similar right of excluding strangers from such portions of the country as their own industrial operations pervade.

CC. LIII. A similar settlement was founded by the British and Russian fur companies in North America.

The chief portion of the Oregon Territory is valuable solely for the fur-bearing animals which it produces. Various establishments in different parts of this Territory organized a system for securing the preservation of these animals, and exercised for these purposes a control over the native population. This was rightly contended to be the only exercise of *proprietary right* of which these particular regions at that time

were susceptible, and to work that a *beneficial use* was made of the whole Territory by the occupants.

CCXLIV. It should be mentioned that the practice of nations in both hemispheres is to acknowledge in favor of any civilized nation making a settlement in an uncivilized country a right of *preemption* of the *contiguous* territory from the native inhabitants as against any other civilized nations. It is a right claimed by Great Britain with respect to her Australian settlements, especially New Zealand; and by the United States of America with respect to the Indians in their back States.

In the claim of Russia to the exclusive "hunting in the Northeastern seas," to say nothing of the rights of fishery and navigation, as such rights are defined in the international law, there is enough in the highest legal authority to support the foundation of the right, which is the handmaiden of peace, namely, the right which is "a mode of original acquisition which is effected by the operation of time," and is "what the English and French jurists term prescription."

On page 298, Vol. 1, Sir Robert Phillimore says:

The doctrine of immemorial prescription is, from the very necessity of the case, indispensable in the system of public law. Accordingly we find it mentioned more than once in the constitutions of the ancient German Empire and as a mode of acquiring public rights.

On pages 299 and 300 the same author says:

Having discussed the position of prescription in the systems of private and public law we now approach the consideration of a matter, holden by the master mind of Grotius to be one of no mean difficulty, namely, international prescription. Does there arise between nations, as between individuals, a presumption from long possession of a territory or of a right which must be considered as a legitimate source of international acquisition?

In seeking an answer to this important question it is necessary to keep clear of all subtle disquisitions with which this subject has been perplexed; whether, for instance, it be the creature of natural or civil law, or whether it must be always founded upon a presumption of voluntary abandonment or de cession by the former owner. Through these metaphysical labyrinths we can not find a clue for questions of international jurisprudence. The effect of the *lapse of time* upon the property and right of one nation relatively to another is the real subject for our consideration. And if this be borne steadily in mind it will be found, on the one hand, in the highest degree irrational to deny that prescription is a legitimate means of international acquisition; and it will, on the other hand, be found both inexpedient and impracticable to attempt to define the exact period within which it can be said to have become established—or, in other words, to settle the precise limitation of time which gives validity to the title of national possessions.

Again, on pages 301, 302, and 303, he says:

CCLVIII. It is true that some later writers on the law of nations have denied that the doctrine of prescription has any place in the system of international law. But their opinion is overwhelmed by authority, at variance with practice and usage, and inconsistent with the reason of the thing. Grotius, Heineccius, Wolff, Mably, Vattel, Rutherford,

Wheaton, and Burke constitute a greatly preponderating array of authorities, both as to number and weight, upon the opposite side.

The practice of nations, it is not denied, proceeds upon the presumption of prescription, whenever there is scope for the admission of that doctrine. The same reason of the thing which introduced this principle into the civil jurisprudence of every country, in order to quiet possession, give security to property, stop litigation, and prevent a state of continued bad feeling and hostility between individuals, is equally powerful to introduce it, for the same purpose, into the jurisprudence which regulates the intercourse of one society with another, more especially when it is remembered that war represents between States litigation between individuals. It is very strange that the fact that most nations possess in their own municipal codes a positive rule of law upon the subject; has been used as an argument that the general doctrine has no foundation in international law.

It is admitted, indeed, that immemorial prescription constitutes a good title to national possession; but this is a perfectly nugatory admission, if, as it is sometimes explained, it means only that a State which has acquired originally by a bad title, may keep possession of its acquisition as against a State which has no better title. If it had been merely alleged that the exact number of years prescribed by the Roman law, or by the municipal institute of any particular nation, as necessary to constitute ordinary prescriptions, is not binding in the affairs of nations, the position would be true. It is, perhaps, the difficulty attending the application to nations of this technical part of the doctrine which has induced certain writers to deny it altogether; but incorrectly, for, whatever the necessary lapse of time may be, there unquestionably is a lapse of time after which one State is entitled to exclude every other from the property of which it is in actual possession. In other words, there is an international prescription, whether it be called immemorial possession or by any other name. The peace of the world, the highest and best interests of humanity, the fulfillment of the ends for which States exist, require that this doctrine be firmly incorporated in the code of international law.

Will this tribunal shrink from the recognition of this doctrine, now that an opportunity, distinctly given, calls for a firm declaration?

The importance of prescription as a basis of title, or right, to any property, or exclusive privilege, is thus stated by Sir Robert Phillimore (p. 305):

But that prescription is the main pillar upon which the security of national property and peace depends, is as incontrovertable a proposition as that the property and peace of individuals rest upon the same doctrine.

To these remarks should be added the observation of another great modern jurist:

The general consent of mankind has established the principle that long and uninterrupted possession by one nation excludes the claim of every other. Whether this general consent be considered as an implied contract or as positive law, all nations are equally bound by it, since all are parties to it, since none can safely disregard it without impugning its own title to its possessions, and since it is founded upon mutual utility, and tends to promote the general welfare of mankind. (Wheaton.)

In one of those treatises which show how deeply the mind of the writer was imbued with the principles of general jurisprudence, Mr. Burke uses the following admirable expressions:

If it were permitted to argue with power, might one not ask one of these gentlemen whether it would not be more natural instead of wantonly mooted these questions concerning their property, as if it were an exercise in law, to found it on the solid rock of prescription? The soundest, the most general, the most recognized title between man and man that is known in municipal or public jurisprudence; a title in which not arbitrary institutions, but the eternal order of things gives judgment; a title which is not the creature, but the master of positive law; *a title which though not fixed in its term, is rooted in its principles in the law of nature itself*, and is indeed the original ground of all known property; for all property in soil will always be traced back to that source, and will rest there. * * * These gentlemen, for they have lawyers amongst them, know as well as I that in England we have always a prescription or limitation, *as all nations have against each other*. * * * All titles terminate in prescription; in which (differently from time in the fabulous instances) the son devours the father, and the last prescription eats up all the former.

These citations from very eminent British authority establish the right of a government by prescription, based on occupancy and claim of title, to any dominion, on land or sea, of anything in the nature of property, whether corporeal, or incorporeal, as firmly as if the right were established by grant or as the result of conquest or cession.

The true doctrine of the international law is stated in the extract above quoted from Wheaton (Vol. 1 p. 207) that "The general consent of mankind has established the principle that long and uninterrupted possession by one nation excludes the claim of every other."

This rule is fully applicable to the dominion of Russia over the fur industry and trade in Bering Sea, which was never yielded or transferred to any government until it was sold to the United States.

Dominion also includes the right of a government to the soil beneath the territorial and adjacent waters. The claim of territorial waters over an area of the sea that is clearly demarked by land boundaries, though not entirely inclosed by the land is, a valid exercise of power by the government that owns the land which forms the coasts and islands that define the boundary. It may not be sufficient to destroy the easements that other nations may have in those waters, yet, it is dominion or ownership of the land beneath those waters, and it is clearly sufficient to support *the municipal jurisdiction* of the government over its own citizens, and, also, to support a claim to any pearl or oyster beds beneath such an area of waters, or any mines that may be found there.

Such a claim and assertion of ownership may not be sufficient reason

for denying to other nations in that area the privilege of navigation or fishery, but that fact does not negative the dominion that may be thus lawfully exercised. To illustrate: If an island should be thrown up by volcanic action or the action of the water within the limits of Bering Sea it would belong to the United States, without first discovery or occupation, in virtue of its dominion already exercised over that sea. And, so, if it became necessary that the United States should close Unimak Pass with obstruction, for any purpose, even to the great inconvenience of navigators or fishermen, the question of the right to do this would be resolved, under the international law, by the other question whether the easement of navigation through that pass was of such importance to the world that the owner of the soil beneath the water would, in justice, be compelled to yield its rights.

In all such cases, where the exercise of the privilege of navigation, fishery, or other easement is injurious to the owner of the soil above which it is exercised, the privilege must yield to the higher right of the dominion of the owner of the soil.

The right of dominion in a sea like Bering Sea or the sea of Okhotsk does not depend on its being separated from water communication with the ocean. If the configuration of the land surrounding it is such as to make it necessary to the peculiar commerce of the country within which it is embayed, or to the defense of such country, or to the proper administration of its powers of government over its own people, it is a right *ex debito justitiæ* that there should be dominion over such sea.

This is the right that is now the foundation of the exclusive right of several nations to dominion over seas that are not inclosed by the land on their shores, as stated by Sir Robert Phillimore, page 225, as follows:

The exclusive right of the British Crown to the Bristol Channel, to the channel between Ireland and Great Britain (Mare Hibernicum, Canal de St. George), and to the channel between Scotland and Ireland is uncontested. Pretty much on the same category are the three straits forming the entrance to the Baltic, the Great and the Little Belt, and the Sound, which belong to the Crown of Denmark; the Straits of Messina (*il faro di Messina, fretum Siculum*), once belonging to the kingdom of the Two Sicilies; the straits leading to the Black Sea, the Dardanelles and Hellespont; the Thracian Bosphorus, belonging to the Turkish Empire. To narrow seas which flow between separate portions of the same kingdom, like the Danish and Turkish Straits, as to other seas common to all nations, like the Straits of Messina and, perhaps the St. George's Channel, the doctrine of *innocent use* is, according to Vattel, strictly applicable.

In the case of the seas here mentioned other nations have the right to the *innocent use of them, but it must rest with the nation claiming*

them to determine whether the use that is made of them by another nation is innocent. This is all that the United States claim of "dominion" over Bering Sea in respect to the protection and preservation of the fur-seals resorting to those waters and the industry in the pelts and oil so long established on their islands, which have no value for any other industrial purpose.

This claim, when these waters are invaded by a destructive method of hunting the seals, is a right of self-preservation. That right is thus stated by Sir Robert Phillimore:

COX. The right of self-preservation, by that defense which prevents, as well as that which repels, attack, is the next international right which presents itself for discussion, and which, it will be seen, may under certain circumstances and to a certain extent modify the right of territorial inviolability.

COXI. The right of self-preservation is the first law of nations as it is of individuals. A society which is not in a condition to repel aggression from without is wanting in its principal duty to the members of which it is composed and to the chief end of its institution.

All means which do not affect the independence of other nations are lawful for this end. No nation has a right to prescribe to another what these means shall be, or to require any account of her conduct in this respect.

COXII. The means by which a nation usually provides for her safety are: (1) By alliances with other States; (2) by maintaining a military and naval force; and (3) by erecting fortifications and taking measures of the like kind within her own dominions. Her full liberty in this respect can not as a general principle of international law be too boldly announced or too firmly maintained, though some modification of it appears to flow from the equal and corresponding rights of other nations, or at least to be required for the sake of the general welfare and peace of the world.

The United States have the right to treat the sudden and dangerous increase of the number of vessels engaged and the number of seals taken in pelagic hunting as an impending threat of the destruction of the seal herd that habitually resorts to their islands. These apprehensions are more directly excited, because they are actually justified by the attack made on the seal herd, than those which are regarded as a just cause of war in relation to armaments by neighboring nations. Of these Sir Robert Phillimore says, on page 253:

COXIII. Armaments suddenly increased to an extraordinary amount are calculated to alarm other nations whose liberty they appear, more or less according to the circumstances of the case, to menace.

In the seizure of ships within the eastern waters of Bering Sea the United States resisted, in the beginning, a raid upon her industry which suddenly threatened its destruction, and this resistance, which was timely and necessary, was made within her own dominion—a domin-

ion established by prescription as to the fur-seal industry, and which also has for its support the principles of the international law which apply to the British waters, above quoted, and to other seas that are not entirely inclosed by the land mentioned in the following quotations from Phillimore, vol. 1, p. 243:

CCV. With respect to seas entirely inclosed by the land, so as to constitute a salt-water lake (*maria clausa*; *mers fermées*, *encloses*; *Binnenmeer*, *geschlossene innere Meere*), the general presumption of law is that they belong to the surrounding territory or territories in as full and complete manner as a fresh-water lake. The Caspian and Black seas naturally belong to this class. Upon the former sea Russia had by treaty with Persia, the exclusive right of navigation with ships of war, and by the treaty of the Dardanelles the Black Sea was practically confined to Russian and Turkish ships of war. But by the treaty of Paris of 1856 this sea is neutralized and open to the merchant ships of all nations and closed to ships of war of any State.

CCVI. There is another class of inclosed seas to which the same rules of law are applicable—seas which are land-locked, though not entirely surrounded by land. Of these, that great inlet which washes the coast of Denmark, Sweden, Russia, and Prussia, the Ostsee as the Germans call it, the Baltic Sea according to its usual appellation, is the principal.

But the right of self-preservation of the United States, in respect to the fur-seal industry, naturally and without reference to the actual property in the animals, extends beyond her dominion. As to such rights Phillimore says:

CXXIV. We have hitherto considered what measures a nation is entitled to take for the preservation of her safety within her own dominions. It may happen that the same right may warrant her in extending precautionary measures *without* these limits and even in transgressing the borders of her neighbor's territory. For international law considers the right of self-preservation as prior and paramount to that of territorial inviolability, and, where they conflict, justifies the maintenance of the former at the expense of the latter right.

If this right of self-preservation is prior and paramount to territorial inviolability, it must be superior to any right or easement of fishing and hunting, and better entitled to the protection of international law. The necessity for protecting this right is now as manifest and indisputable beyond Bering Sea as within its limits. When a source of revenue or a necessary instrumentality of government is attacked, or seriously threatened, the occasion arises for the interposition of the right of self-defense.

The configuration of Bering Sea, its coasts and islands, is such as to give it an exceptional relation to the outside world. It is inclosed on all sides by land and frozen waters, except through the passes of the

Aleutian and Kamtschatkan islands. A blockade of the Aleutian passes would close every port in Bering Sea and, where a nation may be thus locked in, it is not too much to claim that it has the right of dominion over such interior waters and, for purposes of self-preservation, to lock other nations out.

It is a just right that is thus claimed by the United States, and when it is used for purposes of self-preservation it is sustained by international law.

WHEN POINT FIVE OF ARTICLE VI OF THE TREATY WAS UNDER CON-
SIDERATION SENATOR MORGAN DELIVERED THE FOLLOWING
OPINION:

I beg leave to submit the following additional statements and arguments which I think are sufficient to establish that the prescriptive rights of Russia and the United States, in respect of the fur-seals that habitually resort to Bering Sea, are to be safely based upon the continued and unquestioned usage of both countries, as well as upon the peculiar characteristics of these animals.

And I will endeavor to state the reasons that compel me to hold, on these and some other grounds, that the United States have a right of property and protection in these animals.

I have already presented to the tribunal, on a previous day, the views I entertain as to the true history of the claims set up by Russia relating to the exclusive right to control and protect the fur industry in Bering Sea, and have endeavored to state generally the foundations in law and fact upon which Russia rested her claims. I will now again briefly review some of those facts as I believe they exist, and will refer to others, and endeavor to connect them with the doctrines of the law which I think are clearly applicable to establish a right of property in the fur-seals that is well founded, both as a right by prescription and a right growing out of the useful and domestic nature of these animals.

The Russian Government exercised the right to own and control the seals that resorted to Bering Sea, and made temporary grants to its subjects of the right to take them in those waters.

It may be said that this was an assumption of right on the part of Russia not supported by any rule of international law. It was not more distinctly an assumption of right than was the title to the islands, based on the discovery of them by a Russian subject. In both cases a native sovereignty was displaced to make room for the claims of Russia, backed by superior force. The processes of appropriation were the same in reference to the seals and seal fisheries as they were in

reference to the islands, viz, discovery, claim, occupation, and development. Exclusive use and the acquiescence of other civilized powers were the attendant facts that established the right of property in both cases.

As all international law grows out of custom and has no other root, it can not be denied that the right of Russia to appropriate and protect this herd of fur-seals has been established by custom and maintained by constant and exclusive use. Certainly no other nation in its sovereign character has claimed these seals or denied the right of Russia to their exclusive ownership. When Great Britain, in 1825, was treating with Russia for an open sea, free navigation, and the rights of fishing in those waters, she set up no claim to a common right of hunting seals or fur-bearing animals in those regions. Russia went on renewing her charters for these purposes to her subjects, and Great Britain stood by and made no assertion of such right for herself or her subjects for about a half century. Nearly a century elapsed after the colonization of the islands by Russia before any British subject opposed the claim of Russia and the United States, her vendee, to a property right in the seals that habitually resorted to Bering Sea. There are few customary rights that have a surer foundation in usage or upon the doctrine of acquiescence than the world has accorded to Russia in respect of the right to the fur-seals resorting to Bering Sea.

The long acquiescence of Great Britain in this claim of ownership in seals by Russia was not only without objection, protest, or diplomatic suggestion to the contrary, but that Government has encouraged her own people to base an extensive and valuable industry upon the material provided by Russia and regularly supplied to them from her fur-seal husbandry.

It is now too late for Great Britain to say that Russia and the United States mistook the law of nations when they set up rights of property in fur-seals. Ninety years of acquiescence attended with no harm to British people or interests, but with great benefits to both, is time enough in which to establish the consent of Great Britain that live seals resorting to Bering Sea are property, as much so as dead ones are that are slain by British subjects. But the acquiescence of Great Britain is not needed to establish the proposition that there is property in live seals and that it exists *ratione soli*.

THE THIRD QUESTION IN ARTICLE I OF THE TREATY SEEMS TO HAVE
BEEN AVOIDED.

One of the three questions submitted to arbitration in Article I is so dependent for its decision upon the question of property in fur-seals that it should be considered in connection with it. It is concerning "the rights of the citizens and subjects of either country as regards the taking of fur-seal in or resorting to said waters." The foundation of such a right could be none other than a right of property in the seals when captured or killed in nonterritorial waters—a right acquired by the capture of the seal, dead or alive. The final analysis of this question is whether a right of property can attach to a living seal that is found swimming in the ocean. This question is nowhere presented in the treaty or alluded to as a question to be submitted to the Arbitrators, except in the first article. It is the postulate stated by Great Britain in these contentions, around which every fact and every principle of law asserted by Great Britain is grouped.

If British subjects have the right of taking fur-seals in, or habitually resorting to, Bering Sea, it makes little difference what the rights of the United States may be, for they would amount to nothing practically, and, in theory, such a right would destroy all the grounds on which the United States could rest a claim to the right of protecting the seals outside the ordinary 3-mile limit.

This question is submitted for decision in such broad form as to include "the rights of the citizens or subjects of either country, as regards the taking of fur-seals in, or habitually resorting to said waters."

The statutes of the United States, following the unqualified assertions of Russia while she was owner of these islands, assert the ownership of the United States in the fur-seals found in the Bering Sea, and base upon that ownership a governmental industry of great value to the revenues. They punish with severity any person who destroys this property or interferes with the agents or lessees of the United States in its management, and they provide for the lease, to their own citizens under careful regulations, of the privilege of taking seals.

Great Britain has not assumed and could not assume such a relation as that to the fur-seals in, or resorting to, Bering Sea, because it can not claim them *ratione soli*. It sets up no claim of ownership in the fur-seals, but denies that ownership in them is possible until the animals have been captured or killed.

The respective countries occupy, therefore, very different relations to this subject. A declaration of the right in favor of the citizens of the United States to take fur-seals in Bering Sea, if made by this tribunal, is a declaration that the statutes of the United States that forbid such taking are of no validity and should be repealed, while the same declaration when made in favor of British subjects is in perfect accord with the laws, policy, and contentions of that country.

This obvious impediment to a decision as to the right of pelagic sealing in Bering Sea, under which the power of the United States over her own citizens would be called in question, confines the inquiry to the simple proposition whether the United States have a property in the seals in, or habitually resorting to Bering Sea, and the nature of that property.

The crucial test of the right of the United States to property in fur-seals that resort to Bering Sea, whether that right implies a perfect ownership of the seals or an interest in the usufruct of the herd for the support of a legitimate and useful industry, is made by the treaty to turn upon the question whether British subjects have the unrestricted right to take seals on the high seas as free-swimming animals that are *feræ naturæ*. This, therefore, is the main question in the case, and draws within its influence every other question presented to the Tribunal of Arbitration, except those questions that relate peculiarly to Bering Sea, I have already discussed.

This claim of right to take fur-seals on the high seas is asserted as a private and personal right of every person who goes upon the high seas under a recognized national flag; and the employment of the flag for that purpose is not required to be legitimated by a license to fish.

No government has asserted, or ever will assert, the right, as a government, to employ its sovereign powers, or its war fleets, in this business, for the purpose of increasing its revenues. Such conduct by a government would be regarded as a disreputable invasion of the high seas for its own aggrandizement and, when it should come in conflict with the interests of the people of other countries, the invasion would be regarded as a national offense.

The case would be quite different if the purpose of the government was to protect a bona fide claim of property in seals, against destruction. If in quest of seals to which no claim of property was asserted by a government it should send out its fleets to gather revenue, or to destroy such property, claimed by another government, the necessary

result would be a disturbance of the peace and probably a hostile collision. The case is altered in degree, but not in its nature, when a government sustains and adopts the rights of its people to destroy a property or industry claimed by another nation. If such government could not, under the usage of nations or just principles of international law, thus enrich its treasury, it is difficult to see on what principle it could support its people in such conduct for their private gain. In either case the sentiment of justice entertained by the civilized nations would sustain the power that, in good faith, claimed the right to own and protect the fur-seals for the benefit of the commerce of the world, rather than the nation that denied the right of property in seals, until they are captured and killed, and claimed the right to make property of them only by indiscriminate and destructive slaughter.

In this treaty, and in all the diplomatic contentions that have led to its conclusion, both Governments have admitted that property in seals may be acquired, protected, and preserved, at least to the extent of protecting and preserving them by their concurrent regulations, and they have agreed to apply these conceded facts to certain seals that habitually resort to the waters of Bering Sea. These questions are virtually removed from the field of doubt or disputation by the terms of the treaty under which the Tribunal of Arbitration is acting.

Great Britain now asserts that the property in seals can be acquired only by capture, which, under the practice of pelagic hunting, as conducted by its subjects, means that such property can be acquired only by killing the animals.

The United States asserts that property in seals may be acquired while they live, and without actual capture. As to the right of property in the individual animals, this is the only form of issue that is joined between the parties to this treaty.

As to the proper protection and preservation of seal life to which the Governments are both solemnly pledged in this treaty Great Britain contends that taking them at sea is a better method than taking them on land, and is, therefore, the proper method; while the United States claim that the only method of taking seals that can properly protect them is by selecting the animals for slaughter, and that this can be done on the land and can not be done in the water. The killing of the animals is included in each of these contentions as the only way in which they can be made useful to mankind; *and the time, place, and method of killing them that is best adapted to the protec-*

tion and preservation of seals in the class or herd that habitually resort to the waters of Bering Sea is the real inquiry "concerning the preservation of the fur-seal in, or habitually resorting to," Bering Sea that is submitted to the Arbitrators. All the other questions presented for consideration or decision by the Arbitrators relate alone to the powers that either Government may employ and their jurisdictional rights to enforce their respective contentions, or that both should employ concurrently, to protect and preserve seal life, outside of their territorial limits.

Is it true, as it is asserted by the United States, that property in fur-seals may be acquired while they are alive and without actual capture? That depends to a great degree upon the value of the uses to which they are put and the certainty and regularity with which they may be subjected to those uses, and these considerations relate to animals as classes, and to their habits as a class, and not to the peculiarities of the individuals. Some individuals are frequently found among animals that are everywhere classed as domestic which are as wild and fierce (or timid as the case may be) as the wildest of animals, such as horses, cattle, sheep, swine, poultry, and dogs. And some of the wildest and most ferocious animals have been so domesticated by training as to become harmless, and even serviceable, or profitable in a high degree, such as hunting leopards, hawks, cormorants, elephants, and even bears, lions, and tigers. But these exceptional instances of domestication by training prove nothing as to the general nature or habits of the classes of animals in which they are found.

If a class of animals is valuable for the uses of mankind and is, by habit, drawn within reach of man periodically, with regularity and certainty, the nation that thus acquires a settled and peculiar power of control over it on land may base a legitimate industry upon the material it affords, and may declare the animals to be its property. A nation so situated may certainly make such an assertion and declaration of ownership in the entire class of such animals as against the right of its own people to treat them as being wild animals and *res nullius*, and in that sense and to that extent at least it may exercise ownership over them without capturing them. Animals that are classed as being domestic, are protected by a legal presumption of ownership, however wild they, in fact, may be. Animals domesticated by training are sheltered by the same presumption of law, until they have resumed their wild condition.

Wild animals, called game, are not protected by legal fictions but

by legislative enactments. Their protection, when it is accorded, must be by law, because it trenches upon the natural rights of the people to capture and appropriate them. The State assumes a right of public appropriation, and deprives its subjects of the right to appropriate such animals and regulates or prohibits its exercise. If the State takes the further step of declaring by law that it has appropriated these wild animals to the uses of Government and that its possession and ownership are complete by legal construction and without taking actual possession of them, they become the property of the State wherever those laws are in force. Thus all game laws are based on the sovereign right to appropriate wild animals by the state. This right of government, for it is such a right, is illustrated in a forcible way by laws giving bounties for the destruction of wolves and other predatory animals. If a man, for reasons of his own, should claim that he was, *ratione soli*, the owner of a cave that sheltered wolves and therefore of the wolves, he could not resist the right of the state to cause their destruction in accordance with law, even in the cave where they were bred but left unconfined to go forth at will and maraud upon the property of others.

The power of the state in such case is not based on its judicial function of suppressing nuisance, but on its ownership, when it chooses to assert it, over wild animals.

It may be and, in a general sense, it is true that the private owner of the soil on which a wild animal is bred can only acquire actual property in such animal by its capture, but that is far from being true as to the sovereign power in a state. A state that can not dispose of what is *res nullius*, within its own jurisdiction, is wanting in an essential power of sovereignty. It could not otherwise dispose of escheats, waifs, derelicts, or forfeitures that occur without judicial procedure, as many do occur. If these propositions are true it is unquestionable that a state may acquire property in anything susceptible of ownership that is *res nullius*, found within its jurisdiction, by a simple declaration of law and without taking it into actual possession. The property so acquired is the creature of municipal law.

The United States has done all that is necessary to establish its ownership of fur-seals by municipal laws that are operative against everybody within the limits of their jurisdiction, whether those limits include all the waters of Bering Sea or only the land and waters within the ordinary 3-mile limit. Within those limits this declaration of

the supreme legislature establishes property in fur-seals and appropriates it to the United States while the seals are living and without the necessity of capturing them. When this property is found outside the limits of the jurisdiction of the United States the question arises for the first time as to how far the people of other countries are bound to respect the title asserted by the United States. As to the people of the United States, they are bound to respect this title of their Government, if so required by law, wherever their allegiance binds them, and the law does bind them to respect the property of the United States wherever it may be found.

No rule, code, or system of law, municipal or international, is prescribed or alluded to in the treaty as the guide of the tribunal in determining any question submitted to them.

The only allusion that is made in the treaty to laws or jurisprudence is that the Arbitrators "should be jurists of distinguished reputation in their respective countries." This requirement, as well as the nature of the subject, questions, and points submitted to the tribunal for examination, is a sufficient indication that where the recognized principles of international law or the municipal laws of the respective countries furnish a basis and guide to ascertain and admeasure the rights of the respective treaty powers, they shall be followed. But if there are not such precedents and enactments the declaration of their respective rights, outside the limits of their exclusive jurisdiction, is within the competence of the tribunal, and also the declaration of their duty concerning the protection and preservation of the fur-seals in question.

The United States assert their right of property in the fur-seal in question while they are alive and without the incident of actual capture:

First, as a right by prescription derived from Russia, and acquiesced in by Great Britain; and their usefulness to the Government and the people.

Second, as a right established by law within its domain, that is not impaired by the necessary and temporary absence of the seals in search of food, either while they are inhabiting the seal islands, or when they retreat from them on their winter excursions into the Pacific Ocean;

Third, as a right of property that is the necessary result of the habits of the animals, and their natural and compulsory relation to the Pribiloff Islands;

Fourth, as a right of property growing out of the necessity of gov-

ernmental control of the fur-seals, to prevent their destruction, and the alleged fact that such control can be efficiently exercised only by the Government whose territory is occupied by them at their birth, and while they are their property, *ratione impotentia*;

Fifth, as a right of property based on the fact that, with the acquiescence of all nations, established by the fact that no objection or protest was made or adverse action was taken by any nation for a period of ninety years, an industry was established, depending for its support upon the preservation of the stock of fur-seals, which will be destroyed if indiscriminate pelagic hunting is further permitted.

This is the first international controversy that has arisen as to the right of property in or protection of fur-seals, and there is no case, in point, to which reference can be made as settling the law of nations on the subject. But there is no right, recognized by international law, that is opposed by the case of Great Britain to either of these claims of the United States to the ownership of the fur-seals in question, except the right of free fishing in the open sea. This right is claimed for its subjects by the Government of Great Britain, and is made to include fur-seals, as free swimming animals, *feræ naturæ*.

The universal right of free fishing in the open sea is established in the custom of nations, which is the law of nations, and is not disputed by the United States when it is conducted in a just and reasonable manner and against fishes or animals that are *res nullius*.

The free right of fishing can not be exercised to make a lawful capture of fur-seals if they are not wild animals, or if they are animals wild in their nature, but have been lawfully appropriated by a government and are at large in the ocean with the purpose of returning to the dominion of the owner, or under the compulsion of an instinctive necessity for returning to the dominion of the owner, which the animals habitually and periodically obey.

The right claimed by Great Britain is in every sense a right to hunt and to kill game. The seals are never taken, as sometimes fishes are, for purposes of propagation, but only for their value when they are killed. The arts of fishing with hook and line and bait are never practiced as to fur-seals and would be utterly without success. Catching them with seines or nets is impracticable as an industry and, when practiced, only small animals are captured and none are taken alive. That is only a method of capturing them by drowning. The death of the game is the only means of capture at sea, and that is conducted with the har-

poon and the gun—deadly weapons. The hunter attacks every seal within range of his weapons without discrimination or forbearance. His success depends entirely upon indiscriminate attack and slaughter, for he can do no less than that if he hunts with any success. His forbearance, after he has captured his game with seine or hook, may release it alive if it is found to be under age or size and it will grow to its full size; but capture of the fur-seal in the open sea is sure and instant death, and, as to the herd or species, it is swift and inevitable destruction.

If this is "free fishing" it is such fishing as no civilized nation would tolerate within its own territory in respect to any fish or wild animal as useful and as helpless as fur-seals. No civilized nation that has seal rookeries within its territory has omitted to provide laws for their protection against such hunting to the full extent of its powers. *The indiscriminate killing of fur-seals is not, and never will be, sanctioned by the statute laws of any civilized country.*

This right of indiscriminate slaughter of fur-seals on land and sea can only be traced, and, in this case, has only been traced, as to its origin, to a custom of the savage Indians, who were forced to adopt it as a means of living. It is said to have thus gained its root in the law of nations. Civilized nations that have gained dominion over these savage tribes have taken control of the subject and have reversed these laws of the savages in their application to their civilized subjects, and have forbidden them to enjoy this unrestrained privilege. But, in some instances, they have permitted the savages to continue the practice, because it is confined to short distances from the shores, and is conducted with such weapons and in such manner as is not seriously detrimental to the fur-seal species. Moreover, the fur-seals are a source of food supply and of raiment, to deprive them of which would imperil their existence. It is also cheaper to permit their slight raids on the fur-seals than it would be to feed and clothe them.

Finding this right, of savage origin, thus forbidden or restrained by the municipal laws of all nations interested in the subject, and that the uniform course and current of public opinion of the nations is directed to this end for the purpose of preserving the fur-seal species, are we to conclude, in the absence of any direct or conclusive rule of international law, that there is a principle or rule to be found in the laws of nations that sustains and upholds the unrestrained right as it existed among the savages to hunt or fish for fur-seals in the open sea in a

way and at times and places where the practice insures the speedy destruction of the species?

The international law is a growth, and it is directed and shaped by the experience and the sedate judgment of mankind. In its growth it has displaced many rules and dogmas that have proven to be impediments to the march of civilization. Among the most important of these concrete rules that have thus been dethroned is that law of nations which gave to Russia the right to declare the Sea of Okhotsk and Bering Sea to be closed seas. That was the international law when they were discovered and occupied by that power. It has since been changed.

Russia, in 1824, yielded that claim to the advancing growth of international law, but did not yield to pelagic hunters the right, in those waters, to destroy fur-seals indiscriminately. Russia saw that the sentiment of the world, to which she surrendered the right of free fishing and free navigation in Bering Sea, would protect her against the then unmentioned and unclaimed right of visiting destruction upon her seal herds and the industry they supported, upon the pretense of the right of free fishing accorded to the United States and Great Britain.

In this formative and progressive growth of international opinion it may well be asserted that the right of pelagic hunting, with its attendant right of indiscriminate slaughter of fur-seals, has lost the authority of its ancient origin among savages and is no longer a concrete rule or principle or even a reputable dogma of international law, in the application that Great Britain makes of it. International law is based on the same recognized elements of right government that are at the foundation of nearly all the municipal laws of the great civilized powers. This concordance in the elements and structure of the two systems of law is established by many rules that are common to the municipal laws of such nations. In none of them is there a clearer or more distinctly recognized doctrine than that of rights acquired by prescription.

In the English common law an absolute title is acquired to any property after it has been in the open possession of the occupant and those holding under him for the period of twenty years. This is a rule of repose adopted for the peace of society. In those features it is even more useful between nations than it is between individuals. So potent is this rule that the courts of both countries have uniformly declared that any grant, will, deed, or statute, will be conclusively presumed to exist, that is necessary to support the title of the party who has held uninterrupted possession for twenty years.

No just reason can be stated why this wholesome rule, founded in the public policy of both countries, should not apply to the international rights in controversy between them, and should not include every interest in any property, industry, or privilege that has been, for the period of prescription, in the exclusive control and enjoyment of the claimant. The opposing rights, whatever they may be, are lost under a conclusive presumption of a superior title in the actual occupant.

For more than seventy years Great Britain stood by and fully understood that Russia had the exclusive usufruct of the Alaskan seal herd and the exclusive control over them without making any question of that right. If the property had been an island in the sea, to which Great Britain had the actual prior right by discovery and occupation, her title would have been lost if she had suffered Russia to occupy, claim, and hold the island for twenty years under an open and uninterrupted possession.

The theater on which these conflicting rights are enforced has much to do with the limitations and restrictions under which they are to be exercised, if the animals are *feræ naturæ* and are so classed by this tribunal. If such animals leave the land on which they were raised, and are found and killed on the land of another, they belong to him on whose land they are killed, because they are presumed to have escaped to a new place of habitation, and the owner of that place takes them *ratione soli*, as if they had been born and raised on his land. But if they are killed on the highway they are the property of him on whose land they were born and raised, unless they are shown to have escaped from his land in quest of their former freedom or under the wild instinct of going at large, free from man's control.

If seals are made property by the laws of the United States, and are found on the ocean traveling in search of food, the owner has the right to be there and to take care of them. If his presence is not necessary, because it is useless for the purpose of protecting them, and if they are identified as the seals that habitually resort to the Pribilof Islands by their being found in the eastern part of the ocean, the law regards the animals as being in the constructive possession of the owner. Upon this rule of constructive possession the security of all commerce and all personal chattels most largely depends. It is an all-pervading element of property. Possession of a bill of lading, or even an oral contract for freighting carries with it the possession of a ship's cargo of fur-seal skins that the owner has never seen, and attends

them around the earth, on land and sea. All he is required to do to make his possession complete is to identify his property in any way he can. And, so, if the United States own the fur-seals before they cross the 3-mile limit, and have a constructive legal possession of them up to that line, and if the seals are, for instance, nursing mothers going after food to nurture their pups on shore, with a fixed purpose of returning to it, the constructive possession of the animals is secured to the United States after they cross the 3-mile limit. Without this there could be no security for property in animals when they are not on the owner's land, even when they are within his view and he is guarding them in the best way he can.

If the seals are wild animals belonging to the United States by the declaration of positive law, or *ratione soli*, or *ratione impotentia*, or by actual capture, and if this property is not lost when the animal goes into the ocean for food or pleasure, with the intent to return, or under an instinct that dominates its movements and leaves it without an option as to returning, one who captures it when thus at large deprives the United States of their property. If the captor is a citizen of the United States he is guilty of the double wrong of breaking the preserve of the United States, which is closed as to him, and of taking its property. That is poaching. If the captor is a British subject he commits a trespass on the property of the United States, because he found it at a place in the open sea to which it went lawfully and where it was constructively in the lawful possession of the United States.

The case might be different, would be different under the English common law, if the seal, being a wild animal, should enter within British territorial limits and there be slain or captured. In that case the possession would change so as to give the right of property, *ratione soli* to that Government, and that right, or that lawful power over the animal would continue while it remained on British territory. But this is the only instance in which the United States would lose its right of property in the Alaskan fur-seal, born on its soil, while the *animus revertendi* continued to control its movements in its visits to the ocean.

The indefinite right of private fishing in the open sea, in favor of an individual, is too slight and ill-founded to overcome the right of property in a nation that is trying to prevent the pelagic hunter from destroying a great production of commercial value, a source of revenue, and an instrumentality of government. Not that the property rights

or lawful privileges of any man are less sacred than those of a State, but government implies the subordination of private right, in a necessary degree, to the general welfare, and this is the first view of all rights taken by international law. It is on this principle that these two Governments have, in this treaty, substituted their international rights and powers as sovereigns over their people, and all their rights respecting fur-seals, and over the seals and the rookeries, islands, waters, and their lessees, and compel them all to yield to a rule of international law, that the sovereign nations alone can deal with the international rights of their people. If they should extend the existing *modus vivendi* perpetually, no citizen of either country could be heard to make complaint that his private rights had been thus destroyed, or that they were protected by any law that could save them from the power of their own government.

If all the facts presented in this case establish that seals are property to be classed as domestic or domesticated animals, the claim of the right to hunt and destroy them anywhere against the consent of the owner is without foundation. If cattle on the boundary line of Canada, where they are grazed in vast herds, and are almost as wild as buffalo, should wander across the border of the United States, that Government could not seize them without a violation of international law. The case would be stronger under that law if the cattle were owned by the Government of Canada, or Great Britain. The right of property, *ratione soli*, would not accrue to the United States, for the reason that they are domestic animals in their universal classification, and that fact is notice to the world that they are the property of somebody, and are not *res nullius*.

Whether fur-seals are fishes, or domestic animals, or wild animals, is to be determined, first, by the question whether the most essential facts of their existence occur during the period of their lives, on the land. It is possible to nurture them on land, by using proper appliances and food, and they can thus be made to increase in numbers, but that possibility only proves that they are not fishes. This is demonstrated in Paris and London, and elsewhere, by daily experience. It is not possible that a seal can be born and reared in the sea. It is, therefore, to be classed as a land animal, as its creation and birth can only occur on land, and these facts are essential to the existence of this animal.

A singular faculty of the male seals, at least, of living for months on land without taking food, shows that they may be kept out of the sea

for one-third, at least, of their lives, without injury to them. If during that period they were sufficiently fed, there seems to be no reason to suppose that a visit to the sea could not be entirely dispensed with. Indeed, this is done in menageries that travel inland, where fur-seals are kept for years in good condition without once entering the sea. While the sea is the place where their food is sought and found, it is no more the exclusive haunt for such purposes than the wild mountains and plains in America are for the nurture of cattle, and sheep, or swine, or turkeys, or than the open waters of the sea are for the nurture of ducks and geese that are classed as domestic animals. It can not be the food or feeding grounds that distinguish between animals as land or sea animals, or as being wild or tame.

In the case of all these animals the essential and controlling fact as to their classification as land animals or as fishes is that they can only have birth on the land, and are not fishes either in form, structure, instincts, habits, or the necessities of existence. They can not breathe beneath the water.

If they are essentially land animals the question of their domesticity is a very simple one. That fact depends upon their usefulness to man, their inability to escape from his control, and the certainty and regularity of the forces that operate to subject them to his absolute disposal. In these respects the seal has an adaptation and fitness for domestic use that is not so obvious and so certain and easy of control in any other animals. Domestication of other animals that are allowed freedom to come or go at pleasure depends, in a large measure, on their consent. In the case of the fur-seal, the nature of the animal and the conditions of its existence through a series of years, and also of its increase, compel it periodically and with certainty to submit itself to the power of those who own and occupy two small islands in Bering Sea. A similar climate, similar shores and coasts, and the same food have for many ages invited them to select other homes on the islands and shores of the same sea. They have never done so, and there is no ground for the conjecture that they ever will. The Pribilof Islands bear the marks of a long-continued residence of the seals in vast numbers upon their shores. The rough rocks are worn smooth from their hauling over them. What are called the parade grounds of the holluschickie are described as being large areas of sandy soil worn and compacted to the smoothness of a floor. The carpet of fur and hair felted together in the interstices of the rocks and in the sand could only have

been produced by many years of shedding seasons in which it was deposited. In all the close examinations that have been made by many observers and experts sent to the coasts and islands of Bering Sea and to the south and east of it, along the shores and islands of the Aleutian chain and the coast of the North American continent, not a sign or trace of any rookery or hauling ground has been found except upon the two islands of St. George and St. Paul. Neither the evidence nor any rational deduction from it conveys the least conjecture that they ever had any other home.

No two distinct classes of animals have been or can be domesticated by the same means. Some have the social instinct strongly developed, as dogs, horses, cattle, and sheep. Others are simply obedient to superior power and skill, as the elephant, ass, buffalo, llama, and reindeer. Others are domesticated through their greed for food and need of protection, as swine and poultry. Others do not look to man for any of these means of control or for food, as the fur-seals. Yet, in this lowest condition of the power of enforcing or inducing domestication by the art of man, the result of domestication—the dominion of man over them—is the most certain and the easiest of enforcement. Filling the most exact requirements of domestication, as to their subjection to the will of man, no reason exists why they should not be classed as domestic animals. In the legislation of the United States, Russia, Japan, Chile, and the British colonies, where fur-seals go ashore to breed and to shed their coats of hair and fur, the utmost possible protection is given them that can be effected by municipal law.

These acts of protection assume the rightful and full control of the animals, within these respective jurisdictions, disregarding all claims of citizens or subjects to rights of property in the animals, or rights of chase for the purpose of converting them into property. These acts go further and forbid hunting on land and sea during certain seasons, and in certain areas of the ocean, and the seals are appropriated by these Governments for revenue purposes through leases and licenses, for which a tax is paid. And even these privileges are confined only to the citizens of the respective countries and colonies.

In the British system of fur-seal protection, the only country omitted from the list of colonies where seals are found is Canada. It has no coasts or islands on which fur-seals habitually land, and has, therefore, no interest in any rookery that requires protection. Canada lays broadside on the Pacific Ocean, near to the highway of

the fur-seals in their annual migrations in search of food, and causes them to be waylaid when they are bearing the future product, on which the preservation of the species depends, to that place where, for all time, so far as we know, they have gone to beget, deliver, and nurture their offspring. It has also a location near to the narrow passes through which these seals must pass on their journey to and from the Pribilof Islands. There they are waylaid and captured without discrimination as to age or sex and while they are at the absolute mercy of the hunters. They can easily concentrate there, in the open ocean, with vessels enough to exterminate the species by an ambuscade that the seals can not possibly avoid.

If Canada shares the zeal for the preservation of the fur-seal species professed by Great Britain in her correspondence with Russia and the United States, and should exhibit practically her concurrence in the legislation of all the other British colonies that are directly interested in fur-seals, she would find ample opportunity to legislate for their protection. The earliest practice of pelagic sealing in the waters of the North Pacific of which anything is definitely known, was conducted by Indians in the Straits of San Juan de Fuca, one-half of which ocean highway belongs to Canada under a treaty with the United States. Pelagic hunting is still conducted in these straits; and it is from those waters that nearly every sealing vessel is fitted out. It is there that the protection of the British flag is afforded to citizens of the United States to shelter them in violating the laws and public policy of their own country. It is in those waters that the pelagic catch of seal skins are assembled and sent to market. The hunting of fur-seals on the ocean at the passes into Bering Sea, and in that sea and in Russian and Japanese waters, is a great leading industry of the inhabitants of Vancouver Island. If the Pacific ports of the British possessions in America were closed to such traffic the seal herds would scarcely need other protection.

With all these opportunities, Canada takes no part in any legislation for protecting fur-seals in the Pacific Ocean and is wholly out of sympathy with the professions of Great Britain of favor for these just and high purposes. Canada seems to have no respect for the opinion expressed in the legislation of other countries, and especially by all British provinces interested in the preservation of fur-seals; but, to maintain its hold on the seal herds, it urges Great Britain to insist that her people have the right, under the pretext of fishing, to appropriate to themselves any fur-seals found in the sea.

Great Britain, for political reasons, applies the doctrines of protection of fur-seals to all her other colonies, and quotes from the international law the established right of "free fishing" in justification of Canada for a practice that will result in the wholesale destruction of the species. While such contentions are insisted upon by this great power, it would be only injurious to the honest portion of the people of the United States for Congress to enact laws to punish pelagic hunting on the Pacific Ocean. Such laws would only cause a repetition of the practice on the ocean that was rife in Bering Sea before the *modus vivendi* of 1891 was established—that is to say, it would invite dishonest and unpatriotic citizens of the United States to seek the shelter of the British flag, while in its name and under its power they would defraud and dishonor their own country. It was not until Bering Sea was closed, partially, to pelagic hunting of fur-seals in 1891 and 1892 that this new source of danger to the seal herd was understood or appreciated. The results of closing Bering Sea to pelagic sealing caused sealers from Canada and the United States to concentrate their greatly increased forces in hunting the herd on the Pacific and in intercepting them in the Aleutian passes. This was not known until after the treaty of February 29, 1892. This is a new and dangerous condition which the treaty expressly included in the purview of the powers of the Tribunal of Arbitration. It was in the last days of the negotiation that this important phase of the case was brought to notice and provided for.

The question as to the justification of this plan of "fishing," if it is fishing, is as new in international law as the occasion that gave rise to it. If it is "fishing," the method of it is new, and was wholly unknown when the right of fishing anywhere in the open sea was recognized in the law of nations. If the right now claimed to be lawful under this new method is a total departure from fishing, as it was practiced when the right to fish was established, and is fatally destructive of the species of "fish" against which it is employed, there is no warrant for saying that it is sanctioned by international law.

The abuses to which this practice must lead, as already developed in two years of experience, show that the claim set up by Canada of a right to "fish" for fur-seal with fleets of vessels and boats, armed with shotguns and prepared cartridges, and to kill them indiscriminately, has but one element of the established right of free fishing, namely, that it is conducted on the high seas. Fishing with shotguns in the

ocean is new. It is an innovation that destroys the subject to which it applies. If this is a right which the international law must recognize, although it is almost universally denounced by municipal law, it must be limited to a reasonable use, as all privileges are limited. As it is practiced by pelagic sealers at this day it receives the condemnation of international law, because it sacrifices and destroys the benefits of the seal herds to the commerce of the world and imposes on the United States very serious burdens in preserving the seals for the private advantage of persons engaged in an organized hunt, while denying the right of her own citizens to take them.

The United States must protect the seals against her own people or else they will be speedily destroyed. If in doing this all her care and expense are turned to naught by a rule of international law, she can only abandon the seals to their fate, let the islands become barren of all value, and console herself with the reflection that her sacrifice adds a power to the international law that is more authoritative than the judgment of all the nations of the earth, except Canada.

It is a new and very dangerous phase of the rights of fishermen that they can lawfully combine to destroy fish and use the agencies that are necessarily destructive of a given species of fish under the protection of international law. It is still more dangerous if they can lawfully waylay the fish at narrow passages between islands and destroy them as they approach the shores and bays of a neighboring nation, and yet more dangerous if they can lawfully form a cordon of vessels, with great numbers of men armed with shotguns, just outside the 3-mile limit, and can kill seals that are free-breathing as well as free-swimming animals, whenever they rise to the surface for air and come in range of their guns, while they are passing to and fro in search of sustenance for themselves and their offspring. Yet all these combinations and practices are lawful, if the right of pelagic hunting of fur-seals is the same—no more and no less—with the right of fishing in the high seas.

It is not surprising, in view of such serious results as would follow the practice of pelagic sealing, and have already resulted from it, where it is placed on the same footing with the right of fishing in the open sea, that the power to ordain concurrent regulations for its control, or prohibition, was given to a Tribunal of Arbitration.

It is only by regulations, and not by advice, or by the statement of the principles of law that govern the case, that these matters can be settled.

The conclusions I have reached are:

1. That the United States have a property in the seals in and habitually resorting to their islands in Bering Sea.

2. That this property is in the lawful possession and control of the United States when it is found on their islands, or within the limits of their territorial jurisdiction, and they have the exclusive jurisdiction to protect and preserve them within those limits.

3. That this property is also in the lawful possession of the United States when the seals are found in the open ocean and, in such waters, they have such rights of jurisdiction over these fur-seals as any owner of land animals would have over domestic or domesticated animals, when found on the public highways.

4. That, as a sovereign power, the United States may punish its citizens for appropriating or destroying its property on the high seas; but they can exercise no higher powers over property so situated, when it is being appropriated or destroyed by the citizens of other countries, than a private owner could exert under like circumstances.

IN THE DISCUSSION OF THE GENERAL SUBJECT OF THE AWARD TO BE RENDERED BY THE TRIBUNAL, AS TO WHICH LORD HANNEN SUBMITTED A FORM OF AWARD, SENATOR MORGAN SUBMITTED THE FOLLOWING REMARKS:

I supposed that the debate on the questions arising under the treaty had been closed, and that the members of the tribunal would now deliver their opinions, *seriatim*, in the order agreed upon. But Lord Hannen has made some criticisms on the attitude of the United States and the arguments of its counsel, that seem to open up the discussion of the whole subject, and I must not allow them to pass without notice.

As I have had occasion several times to remark, during the progress of the discussion before the tribunal, this is not a litigation between the United States and Great Britain in which a judgment can be rendered by this tribunal in favor of one party and against the other for a right asserted, or for property or damages which one party must gain and the other must lose.

The treaty, which is a law to the tribunal, provides that each party, at a certain time, shall deliver its printed case to the arbitrators, and to the agent of the other party, in which its claims shall be fully stated. Thus two independent cases are required to be stated and submitted for decision. This was done, and when it was done, the attitude of the two Governments, as to the claims they respectively submitted, was fixed and determined. This requirement was not observed by Great Britain, but other evidence not presented and submitted either in its case or counter case, was offered during the progress of the oral argument and was received and considered by the tribunal.

I insist that these proceedings do not comprise one case, but separate cases. They are to be heard together, but they are not cross actions, neither are they consolidated actions, as is sometimes the

case, under the orders of a court having plenary powers. This tribunal has no such powers, but must decide each case, as it is stated and submitted, upon its merits.

The simplest analysis of the cases, to which all other questions are merely incidental, is this: that Great Britain claims for its subjects the unlimited, unrestricted, and unqualified right of hunting and killing fur seals of all ages, sexes, and conditions at any place in Bering Sea and in the North Pacific Ocean, that is outside the ordinary territorial limit of 3 miles from the islands and coasts of the United States. That is the entire claim of Great Britain, as it is submitted to this tribunal in the British case.

The United States claim the ownership of the fur-seals that are in, or that habitually resort to Bering Sea, and the right to protect them wherever they are found, outside the territorial limits of Great Britain. The tribunal should, in my opinion, have taken up these cases separately and have decided them, giving due consideration to the objections raised in the counter case of either party to the case of the other party. The decision of the rights claimed in either case, does not, necessarily, dispose of the rights that are claimed in the case of the other party. A decision that the United States has the ownership of the seals or the herd of seals does not affirm its power to extend its statutes into the Pacific Ocean and enforce them there against the subjects of Great Britain in any and every case of trespass upon that property that may occur, or may have occurred, even recently and upon hot pursuit of the offender.

Neither would a decision to the contrary entitle the subjects of Great Britain, or of the United States, to hunt fur seals, up to the borders of the Pribilof Islands, in such force, and by such methods as would seriously endanger, disturb, or threaten the industry and the revenue system that the United States has established there for the purpose of maintaining government on the islands and of encouraging the natives there in earning a support and in raising themselves to better conditions.

It is claimed here, as it was claimed in the arguments of counsel for Great Britain, that the right of pelagic sealing exists, as to fur seals, under the international law, in favor of the subjects of Great Britain, and also in favor of the citizens of the United States, without any restrictions whatever. That no conditions of time, or manner of hunting the seals, or as to the age, sex, or other condition of the animals, or as to the

numbers engaged in hunting them, or that their purpose is to destroy them, or that their implements of warfare are most deadly, can operate to control the pelagic sealer outside the limits of territorial waters.

This view of their rights is not disposed of by deciding that the United States either has or has not the right to protect the fur seals, but that question is pertinent in considering whether, under this treaty or in the international law, the right of pelagic hunting of fur seals exists and whether it is an unlimited and unrestricted right.

Lord Hannen has expressed the opinion that all animals found swimming in the sea, whether they are birds, fishes, or beasts, if they are not within territorial waters, are the subjects of rightful pelagic hunting. Under such a law an animal that is domestic, such as a hunting or ducking dog, or a flock of tame geese, or ducks, or swans, would forfeit the protection of the law, and their owner would lose his property in them in favor of the better right of the first taker, if they, in search of food or prey, should swim out on the water, as they often do, beyond the ordinary 3-mile limit, or that such fowls would be liable to the *free sport* of the hunter if they should fly through the air in their excursions beyond that limit.

In the effort of Lord Hannen to apply to the fur seals a rule of property and the right of protection that would apply to wild ducks and geese, and to swallows whose nests are taken and used for food in China, he neglects to give due weight to the cardinal fact on which, in one aspect, the case of the United States is based. It is the fact that the fur seals that are in, or that habitually resort to Bering Sea, are *sui generis*, and that no other fishes, birds, or animals that visit the ocean for food or pleasure have a certain fixed abode or home on land.

His lordship omits to give due weight to the fact that no other animal visits its place of abode with such unvarying certainty, and that, when they are assembled they live upon very limited areas of land, and in compact masses, only separated from each other by the distance of a few feet and arranged upon adjacent grounds in classes entirely distinct from each other, whereby the animals that are fit for slaughter for their pelts are kept entirely separate from those engaged in the duties of procreation and the nurture of the young. So peculiar is this trait that the young pups collect in groups, called pods, and separate themselves from all other classes of seals, and keep up the separation until they return to the islands the next summer after they are born.

Nature has not given to any other class of animals, wild or domestic, this clear indication of their serviceable quality for the use of man and their unavoidable destiny to become subject to his complete dominion.

The wild geese and ducks and the swallows mentioned by Lord Haunen never lose the instinct of escape from man, which the seals have not except when they are in the water, and even there it can scarcely be called an instinct or habit, until it has been created in them by the ill usage of pelagic hunters.

When swallows, geese, and ducks wish to escape from the presence of man they have, at all times, the means of escape on the wing, which is their effectual method of avoiding capture.

The seal on land are almost entirely incapable of escaping death at the hands of man. The breeding places of the wild ducks and geese are scattered around the whole earth, above certain latitudes, and many species breed in all latitudes. They are *res nullius* because man can not lay either his destructive or preserving hand on them at pleasure. Would it be so as to their nests or eggs, which may be taken at pleasure, or their young that can not escape, and are, *ratione soli*, the property of the owner of the soil?

There is nothing in the evidence relating to Chinese swallows or their nests, but if they build their nests on the rocks along the sea-coast, as I am informed they do, the nests belong to the owner of the soil as much as the honey collected by bees and stored in a tree that stands upon his land. But it is needless to seek for rules that will govern the rights of the United States in respect to fur seals by citing those that may militate against those rights when applied to fishes, birds, or beasts, that differ from them in their essential and elementary instincts and do not invoke the duty of preserving them by laws, because they can not escape from man or protect themselves.

I do not intend to examine the question of property, or the right of protecting it, with reference to the bearing and authority of cases decided in England or the United States. As far as analogies may be useful in reaching just conclusions, they are found to support the contention of the United States upon the authorities that have been so ably discussed.

Mr. Justice Harlan's very clear and cogent opinions on this view of the case, in which he quotes with approval from the text-books upon municipal and international law, really leave nothing for me to say. I fully concur in what he has said on these topics. But I feel war-

• ranted and required to add some other views, arising upon the whole treaty, as to the matters now under special examination.

This being now a controversy between Governments, the questions submitted are to be decided according to the duty of the high contracting parties toward each other, both having the purpose of protecting and preserving the fur seals. This duty arises out of the treaty and a community of purpose, as it is solemnly avowed; and it is not admeasured by the international law, as would be the case where a controversy existed that involved the ownership of the seals, for instance, if they were claimed to belong to each Government, and the tribunal was required to decide as to which of them has the better title.

The tribunal is intrusted with the power and has accepted the duty of providing for such concurrent action of the two Governments as will protect and preserve the fur seals, when it shall determine that the United States, in virtue of its own sovereign powers, and acting alone, can not preserve them.

If the decision of any of the questions in this case is made to depend solely upon what is the declared international law, there could be no need for asking other nations to accept and ratify the award. Their acceptance of the award, as the correct ruling upon questions of international law, would simply amount to an affirmance of the legal propositions involved in it. All nations are bound by the international law, and, to accept a decision of this tribunal, by convention, that is merely in accordance with that law, would only be to agree to do that, by treaty, which they are already bound to do under the international law.

It is because no one can say that the international law determines these questions, that it is proposed hereafter to establish by treaty, in which all the States are requested to concur, what is their duty in giving protection to the fur seals.

All property originates in municipal law or recognition, and no property is created, or defined, by international law. I admit the influence properly to be exerted by the judicial decisions on analogous questions by the courts of England and the United States, not as authority, but as argument, or precedent.

I understand that the right and duty of protecting fur seals against indiscriminate slaughter is much more distinct and obligatory, than is the right and duty of protecting animals that are less valuable and are not placed so entirely within the dominion of man.

I understand the treaty to make it the duty of the tribunal to consider the entire subject, in the light of the desire of the two nations to protect and preserve the fur seals, and to have it determined whether the United States has the right and power to deal, single-handed, with the subject of proper regulations to protect and preserve the seal herd.

In this view, the attitude of the two governments towards the inquiries submitted to the tribunal is special and exceptional, and this is evidently a cardinal feature in the cases submitted to the tribunal. No other such situation ever existed, or ever can exist, between two nations and it must be provided for, if at all, by a special award, upon special facts, and not merely by seeking analogies in the decision of questions, in municipal courts and between private litigants, about wild animals as to which a private right of property is in question. In either view of the subject, the right of property in fur seals is well founded. The rule of the common law, and the Roman law, as to the acquisition of property in animals that are *feræ naturæ*, when applied to fur seals, show conclusively that these animals are capable of specific ownership while living.

This is a great public matter that has engaged the attention of two Governments, and all their geographical, industrial, maritime, and governmental relations enter into the proper consideration of the questions submitted to the tribunal. The peace between the nations is also a grave consideration for the tribunal, as well as the effect of the award upon the interests of Russia and Japan. The power to ordain regulations and to make them an essential part of the treaty is so interlaced with questions that are judicial, as to give to the powers of the tribunal and the award that it shall make, only such effect as the treaty provides—an effect peculiar to this case and not such as follows the judgment of a court.

When the fur seals are properly protected and preserved by the award of this tribunal, the purpose of its creation will have been accomplished and the full limit of its duties will have been reached. Then the appeal of these two great powers to other nations, to accept the award, will contain no assertion that the award is a correct finding upon the international law, to which all nations are bound, without convention, but an affirmation that it is a just and salutary arrangement, reached by treaty, and suited to the purpose, in the Pacific Ocean and in all other seas, of preserving seal life and of restoring it to its condition before it was so nearly destroyed in the Antarctic Ocean, and so seriously threatened with extermination in the North Pacific Ocean.

I believe that in every step we take, and in every decision we make in this matter, we should avoid abstract questions and inquiries that can have no practical effect upon the avowed purpose of the parties to protect and preserve the fur seals. The attitude of the two Governments towards the admitted duty of preserving the fur seals in the future; the powers they have exercised jointly and severally, over the subject in the past and in this treaty; the configuration of the Aleutian peninsula and the islands of that archipelago; the peculiarities of seal life, and the destructive methods of seal hunting in the open sea; the proper restriction, or necessary prohibition to be imposed upon pelagic sealing; the right of the United States to defend and protect its powers of government, its revenues, and to preserve its industry on the islands; are all brought within the scope of this inquiry, by the provisions of this treaty, and are all to be considered in determining what are the just and equitable rights and the duties of the high contracting powers.

Not merely the rights that would result in a judgment for one party or the other in a suit by the United States in a municipal court for the recovery of the value of a seal killed by a pelagic hunter on the high seas, but that the just and honorable international obligation resting by agreement upon both Governments, will find authentic and final expression in the award of this tribunal.

On all hands it is admitted that the award, when rendered, will constitute a stipulation of the treaty in the same sense as if it had been written in the text of the agreement by the high contracting powers. This being so, and the power of this tribunal to determine and establish concurrent regulations *being a power to ordain, and not a juridical power to decide*, and both being united in the tribunal and subject largely to its discretion, the facts that bear upon the judicial inquiries and upon the powers of ordination are the same, are made identical by the treaty, and are to be considered as one entire body of evidence, in respect of both classes of powers.

No abstract question of law is submitted to this tribunal. The law that is intended to govern this case in all its parts and phases is the law of justice, comity, trade, commerce, humanity, good will, and peace, in carrying out a common purpose of protecting and preserving the fur seal species in the interests of commerce upon the facts presented to the tribunal and such as are within the reach of its judicial knowledge. It is upon this view of the duties of the tribunal and of its powers and of the rights of the parties and the complexities they have

given to these inquiries and questions by the treaty that I will examine the subject.

The very general manner in which the questions submitted to arbitration are stated in the treaty, and the indefinite statement of the claims of the respective governments, the absence of direct issues of fact or law in the submission, and the unlimited range of inquiry as to all facts, whether historical or judicial in character, the general form in which all questions are stated in the treaty, seem to demand a broad and just award by the tribunal that will cover a great controversy that is entirely new. In the treaty of 1892, differing from all former treaties on like matters, the facts which constitute the foundation of the claims of the respective parties are not stated hypothetically, or in any form, nor are the questions that arise on those facts stated in any issuable form, nor are the rules of law or justice stated under which the tribunal shall ascertain and admeasure the rights of the parties.

In this treaty everything is left to the ascertainment and the determination of the tribunal within very broad limits of inquiry upon certain topics. The only separate and specific duty imposed on the tribunal is that they will ascertain and declare the facts, and apply the law that, in their opinion, gives a true answer to certain sweeping inquiries stated in Article VI of the treaty. This is an exceedingly broad and comprehensive grant of power and discretion to this tribunal of arbitration, in reference to a subject in which all civilized countries are interested, and is, to many uncivilized people, a source of supply of food and raiment.

These great nations found occasion to project, if not to formulate and to establish by impartial arbitration, new rules of right and convenience, and also of jurisdiction, that are not distinctly stated in the international law, for the protection and preservation of the fur seal, to be enforced outside the jurisdictional limits of the two governments and of all other governments. In doing this they agreed to bind themselves to accept and abide by the rules that this tribunal shall adopt, and to coöperate in securing the adhesion of other powers to them. A course somewhat similar was followed by them in the Treaty of Washington, of 1871.

When the nature of this splendid fur is considered, and the fact that it is the only source of supply of large pelts that is available for the uses of mankind; and that the fur seal is the only fur-bearing animal that can be preserved by law, on the principle of domestication; and that

its value, and the easy prey it offers to a combination of vessels and weapons for its capture have destroyed the species, in a commercial sense, in the southern hemisphere, and are rapidly destroying it in the waters of the north Pacific, it would only be surprising if Great Britain and the United States, whose people are alone engaged in this work of destruction, should not have agreed to provide some effectual means for the protection and preservation of this valuable animal.

In the confident expectation that all the countries where fur seals are bred will adopt the methods of protection and preservation that this tribunal shall provide, to operate outside the acknowledged limits of exclusive, sovereign, national jurisdiction, if they are found to be wise, just, and practical; and that the Governments concerned will take proper care of these valuable animals, on their islands and coasts; these two Governments have instituted a plan for securing these ends, which is well adapted to that purpose. That result will be secured if the tribunal will exert, firmly and wisely, the high powers confided to them.

The confidence felt by these Governments in the beneficial results of arbitration, is fully justified by their past experience, and has led, doubtless, to the increase of powers and discretion given, in the treaty of 1892, to this tribunal of arbitration.

The whole civilized world is interested in the result, and many justly expect that the award, when made, will cover the great question of the proper protection and preservation of the fur seal species in such manner that the regulations may win the approval and secure the adhesion of all the maritime powers.

It would be a serious dereliction of duty on the part of the tribunal if they should fail to deal with this great question in the broadest way, included in the purview of their powers, and should confine their declarations and award to narrow or technical grounds, or to a simple declaration of rights of property in fur seals, or to the powers, or jurisdiction to preserve or protect them in Bering Sea, and should provide no regulations under which these rights, powers, and jurisdiction should be enforced, or exerted, wherever the seals are found.

The necessity for protecting this property, *vis pendens*, was not fully understood, and could not be, until the close of the sealing period for 1892, after the treaty had been concluded. In 1891 the destruction of seal life, resulting from the catch of 30,000 seals in Bering Sea, by pelagic hunting, was estimated as being at least equal to the number

killed on the seal islands. And this was the result despite the fact that the *modus vivendi* for that year was signed on June 15.

The *modus vivendi* for 1892 was signed on the 18th of April, before the pelagic hunting had occurred for that year. In both these agreements of 1891, and of 1892, which were intended, in the first one, to carry out the proposed treaty, and the treaty as agreed upon and signed, in the second one, a prohibition of pelagic sealing was agreed upon and enforced against the people of each Government. These were "concurrent regulations," and the necessity for them was thus admitted by both Governments. They were not extended to the North Pacific, because the destructive effects of pelagic hunting there were not then known to the United States.

Now, it is ascertained that the seal hunting in the open ocean and at the entrances to Bering Sea is even more destructive beyond the jurisdictional limits of both countries than it ever was in Bering Sea. These facts have been developed since the cases of the parties were delivered to the arbitrators.

I am led to restate these facts in part and to repeat arguments I have had the honor to submit upon previous phases of this discussion, because of my earnest desire that the award of the tribunal should measure up to the opportunities and demands of a great occasion and should recommend itself to general acceptance by the civilized nations.

The question stated in "point" five, of Article VI, of the treaty, relates to the right of property and the right of protection of that property, which the tribunal may fully decide without touching the question of the exclusive jurisdiction of Russia and the United States to provide for the protection of that property, if the right to it is found to exist. Those questions—"points"—as to the exclusive jurisdiction of the United States arose out of claims that Russia is alleged to have asserted and exercised "prior and up to the cession of Alaska to the United States," without reference to the question whether those claims were well-founded in custom, in natural or moral law, or in the law of nations.

The claim, or question, stated in point 5 of Article VI has a wholly different foundation. It is a claim of "property in the fur seals frequenting the islands of the United States in Bering Sea," and the correlative right of protecting them when such seals are found "outside of the ordinary three-mile limit," to the same extent that such right

exists and may be protected when the seals are found inside the acknowledged territorial limits of the islands.

This claim of property in the United States, if it exists and so far as it is not affected by prescription, is based upon the habits of the animals which make them domesticated property and subjects them absolutely to the possession, dominion, and use of the United States by an irrevocable law of nature, which supplies a just foundation for its protective legislation.

The right of "exclusive jurisdiction of the United States" to protect the seals "found outside the ordinary three-mile limit" is a right that is based on moral, or municipal, or international law, or upon all those laws combined in support of justice, the protection of commerce, and in aid of humanity and the peace and good will of nations.

The right of the United States to this property is neither greater nor less, when it is based on the nature and habits of the seals, because Russia may have asserted or exercised "exclusive rights in the seal fisheries" in Bering Sea; nor is the right to protect the property necessarily dependent upon the answer to the question, "*What exclusive jurisdiction in Bering Sea did Russia assert and exercise?*" While this right and this jurisdiction are correlated, they are not identical, nor do they depend necessarily upon each other in the form in which they are stated in the five points of Article VI.

If the arbitrators find that the United States have no "exclusive jurisdiction" to protect "the fur seals in, or habitually resorting to the Bering Sea," such a decision must mean that, as between the United States and Great Britain, whose subjects claim the right to take the seals wherever found "outside the jurisdictional limits of the respective Governments," the consent of Great Britain is necessary in that area of the sea, to supply such lack of jurisdiction by "concurrent regulations" to suppress, or control, pelagic hunting. And, if the Arbitrators hold that they have no power, in that event, to protect the seals by ordaining concurrent regulations for that purpose, and if the United States have no lawful power to protect them, and, if Great Britain will not consent to a joint protection of them, they will perish utterly.

If the arbitrators hold that the United States have the "exclusive jurisdiction" to protect and preserve the fur seals "outside their jurisdictional limits," (which is a solecism), because they are the exclusive owners of the seals; or, if they hold that pelagic hunting outside the ordinary territorial limits of three miles around the seal islands does

not so affect seal life as to make it necessary to establish regulations for the suppression or control of that practice, they will have no need to make any award further than to dismiss all that part of the submission and leave the questions submitted to them undecided.

This would not be a "result of their proceedings" that would be final, "as a full and perfect settlement of all the questions referred to the arbitrators," but would leave the Governments confronted to each other, with no barrier between them to prevent hostilities in future.

If the arbitrators should hold that the United States "has exclusive jurisdiction" to protect the fur seals on the open ocean, because the seals are their exclusive property, and if they should stop at that declaration, many questions as to the manner of exerting that right or power, which lie beyond that determination, would arise; such as the right of visitation, search, and seizure; and also questions as to the effect of statutes of the United States beyond the limits of their territorial jurisdiction, and also the question of the condemnation of ships belonging to Great Britain, in the courts of the United States.

Proper concurrent regulations, established by this tribunal, would result in establishing the peace of nations, and the protection and preservation of a valuable species of animals, the destruction of which would seriously injure commerce, would deprive many thousands of people of remunerative employment, and would leave a blot on the civilization of the age.

To hold that there is no necessity for the regulation of pelagic sealing by some power or some authority is to ignore the evidence in the case and the joint report of the commissioners appointed under this treaty, and the statement and opinions of the diplomatic representatives of both countries and of Russia and Japan.

Canada alone has formerly contended that no necessity exists for regulating pelagic sealing, but that the Government has so far modified its views as to agree to the draft convention submitted to Mr. Blaine by Lord Salisbury, which proposed a close time for pelagic sealing in the North Pacific Ocean and in Bering Sea. If Canada has not gone far enough in the right direction she has, at least, admitted the necessity of some progress, and has shown her willingness to conform her action to the views uniformly expressed by the Government of Her Majesty, that the seals in Bering Sea and the North Pacific should be preserved, and that unrestricted and indiscriminate sealing should not be allowed. There is no dispute that this has been the avowed purpose of both

Governments in their long and exhaustive diplomatic correspondence and negotiations, and in agreeing to arbitration upon the whole "subject" of protecting and preserving the fur-seal in Bering Sea, and resorting to or frequenting that sea. But I think this matter is of sufficient importance in its bearing upon the duties of this tribunal to justify me in a concise statement of my views as to how the questions of difference arose between the United States and Great Britain, and how their treatment gave rise to the questions formulated in the treaty.

The United States seized some of the sealing vessels employed in Bering Sea and they were condemned in their courts in Alaska, and thereupon the Government of Great Britain assumed the protection of vessels so employed under her flag, and made protest to the Government of the United States against their seizure and confiscation and against the arrest and punishment of her subjects sailing under the British flag, and made a claim for damages in their behalf.

The first seizure was an American vessel, August 1, 1886. Thus it was this diplomatic controversy had its origin in the insistence of Canada upon the claim of an unrestricted right of pelagic sealing without regard to the preservation of seal life, or the rights of the United States, or their interests; and it was, at first, confined to pelagic hunting of fur seal in Bering Sea. It was the abuse that grew up under the asserted right of pelagic sealing, as it was practiced by the Canadians, and not the arrest of the vessels that gave origin to this controversy. The initial point of the negotiations that resulted in the treaty of February 29, 1892, was established in 1887. It was expanded into this treaty and has drawn after it, as an incident, the contention relating to jurisdiction over Bering Sea.

The contentions of the two Governments were confined to questions that affected their respective claims of rights, within Bering Sea, when Mr. Phelps, minister to Great Britain, on November 11, 1887, brought the subject to the attention of Lord Salisbury, and then proposed, on the part of the Government of the United States, "that by mutual agreement of the two Governments, a code of regulations should be adopted," etc., for the preservation of the seals in Bering Sea, "entirely irrespective of any question of conflicting jurisdiction in these waters."

Mr. Phelps wrote to Mr. Bayard, as follows :

His Lordship promptly acquiesced in this proposal, on the part of Great Britain, and suggested that I should obtain from my Government and submit to him a sketch of a system of regulations which would be adequate for the purpose.

On April 16, 1888, Lord Salisbury, with a view to meeting the wishes of the Russian Government respecting the waters surrounding Robben Island, suggested to Mr. White "that besides the whole of Bering Sea those portions of the Sea of Okhotsk and of the Pacific Ocean north of latitude 47 degrees should be included in the proposed arrangement." (See Appendix, Vol. I. to Case of the United States, p. 179.) This fixed the area of the "close time" 200 miles south of the northern border of Washington State. He also suggested that the close time extend from April 15 to October 1.

Mr. Bayard, through the plenipotentiaries of the United States, presented the proposal made to Great Britain and the assent of Lord Salisbury to the same, to the Governments of Japan, Russia, Germany, and Sweden-Norway, and asked their concurrence in an international convention to settle the question of pelagic fur-seal hunting, on the general basis of the informal agreement reached by the two Governments. Both Japan and Russia cordially assented to such a negotiation, and Sweden and Norway said:

The Royal Government having no interest in the seal fisheries, His Majesty thinks there is no need to take part in any treaty in reference thereto on the part of the United Kingdoms. He, however, expresses the desire that a mutually beneficial accord may be arrived at between the interested powers, and that the same may be maintained, with a reservation that the powers not at present interested may join in such an arrangement in future, if they desire.

Japan replied to the note of the United States October 8, 1887, and said:

The unregulated and indiscriminate slaughter of the sea otter as well as the fur seal on the coasts of Japan and in their coterminous waters is a subject which has for many years engaged the attention of the Imperial Government. The experience of His Majesty's Government justifies the belief that the end sought to be obtained can be best secured by means of a *coöperative international action*, and they therefore cordially approve of the suggestions of the honorable the Secretary of State.

The Russian Government on November 25, 1887, said:

Mr. Wurts, under date of August 22 (September 2), was good enough to communicate to me the views of the Government of the United States of America upon the subject of the desirableness of an understanding, among the Governments concerned, for the regulation of the taking (*la chasse*) of the fur seal (*loutres*) in the Bering Sea, in order that an end might be put to those inconsiderate practices of extermination which threaten to dry up, at their source, an important branch of international commerce.

We concur entirely in the views of the Government of the United States. Like it, we also have been for a long time considering what means could be taken to remedy a state of things which is prejudicial

not only to commerce and to revenue, but which will soon work disastrous results, *not only to the well being but even to the existence of our people in the extreme Northwest.* The establishment of a reasonable rule, and of a lawful system in the use (exploitation) of the resources *which furnish their only industry,* is for those people of vital importance.

The pressing interest which the Imperial Government has been thus called to consider had already suggested to it the idea of *an international agreement*, by which this interest might find its most efficient protection. It is by this way that the different questions involved can be best resolved, and among which there exists, in our opinion, a close connection.

The proposition of an accord emanating from the Government of the United States, and which we take pleasure in considering as a step toward that general solution, must, of course, but meet the sincere sympathies of the Imperial Government and its active support; and this I pray you to make known to the cabinet at Washington. Please receive, etc.

Thus the four powers that include between their respective territorial possessions all the waters of the North Pacific Ocean and of the seas in which the Alaskan fur-seal is found, were in complete accord and agreement *that pelagic sealing should be regulated by their mutual consent.* And Lord Salisbury, as late as February, 1888, informed Mr. Phelps that he assented to Mr. Bayard's proposition for a close time for fur seals between April 15 and November 1 in the Bering Sea, and stated that he would "join the United States in any preventive measure it may be thought best to adopt, by orders issued to the naval vessels in that region of the respective Governments." (See Appendix to American Case, vol. 1, p. 175.)

The negotiations progressed thus favorably until Canada interposed to prevent the settlement of the question as to which four great powers had practically agreed, and asserted that no close time was necessary.

Canada, without diplomatic power or responsibility, still had power, through her political relations with Great Britain, to control and embarrass the diplomacy of the Imperial Government, even in antagonism with the interests of the British people, as stated by Lord Salisbury.

Without questioning the right or duty of Great Britain to consult the interests or wishes of her colony in the matter, it is a serious and dangerous embarrassment to the United States that they must deal only with Great Britain in settling difficulties that relate to the conduct of the Government of Canada. She issues fishery clearances to vessels belonging to her people, and under them the citizens of the United States are sheltered in their violations of United States statutes; and, when

they are arrested for the wrong, Great Britain is called upon to interpose, at the moment when she is negotiating with the United States for its suppression. This is a very embarrassing situation.

On the 13th of August, 1888, Mr. Phelps held a conversation with Lord Salisbury, and urged the completion of a convention between the United States, Great Britain, and Russia, which had previously been the subject of discussion between these Governments. (See Appendix, vol. 1, to Case of the United States, p. 182.) Mr. Phelps says:

This convention had been virtually agreed on, except in its details; and the Russian as well as the United States Government were desirous to have it completed. The consideration of it had been suspended for communication by the British Government with the Canadian Government, for which purpose an interval of several months had been allowed to elapse. Lord Salisbury's attention was repeatedly recalled to the subject by the United States, and, on those occasions, the answer was that no reply from the Canadian authorities had arrived. During this interval, Canada was aiding with all its powers, as a Government, in supporting and aggravating the practices which Great Britain desired to repress, and thus left her in a most doubtful and disagreeable attitude in her relations with the United States.

Mr. Phelps states further that—

In the conversation on the 13th August, above mentioned, I again pressed for the completion of the convention, as the extermination of the seals by Canadian vessels was understood to be rapidly proceeding. His lordship in reply did not question the propriety or importance of taking measures to prevent the wanton destruction of so valuable an industry, in which, he remarked, England had a large interest of its own, but said that the Canadian Government objected to any such restrictions, and that until its consent could be obtained, Her Majesty's Government was not willing to enter into the convention, that time would be requisite to bring this about, and that meanwhile the convention must wait.

It is very apparent to me [says Mr. Phelps] that the British Government will not execute the desired convention without the concurrence of Canada. And it is equally apparent that the concurrence of Canada in any such arrangement is not to be reasonably expected. Certainly Canadian vessels are making profit out of the destruction of the seal in the breeding season in the waters in question, inhuman and wasteful as it is. That it leads to the speedy extermination of the animal is no loss to Canada, because no part of these seal fisheries belong to that country, and the only profit open to it, in connection with them, is by destroying the seal in the open sea during the breeding time, although many of the animals killed in that way are lost, and those saved are worth much less than when killed at the proper time.

Under these circumstances the Government of the United States must, in my opinion, either submit to have these valuable fisheries destroyed or must take measures to prevent their destruction by capturing the vessels employed in it. Between these alternatives it does not appear to me there should be the slightest hesitation.

It was thus that Canada was permitted to intervene, *as a Government*, to prosecute the right of Canadians who were British subjects,

and not Canadian subjects in the international sense, and in a matter as to which his lordship remarked that "England had a large interest of its own," and that "until its (Canada's) *consent* could be obtained Her Majesty's Government was not willing to enter into the convention."

The propriety of that intervention by Canada was a matter between those Governments, but the embarrassment and damage to the United States was increased by the fact that Great Britain thus changed *her attitude* on these questions without changing *her views of what was right* in the matter, as to the preservation of the fur seals. The United States were thus forced to abandon further efforts at coöperation with Great Britain and to vindicate their separate rights, and the diplomatic discussion was then directed to the property rights of the United States in the fur seals and the "fisheries," and to their rights of jurisdiction to protect and preserve them.

It was in the manner I have just stated and under these circumstances, that the United States was forced to yield her efforts for a joint arrangement with Great Britain for the protection of the fur seals in Bering Sea, and to fall back upon her rights as owner of the seals, and of the industry based upon the security of these animals against indiscriminate slaughter.

The situation was emergent, and the United States acted upon it to save the seal herd and to protect her rights and powers of government, which were indispensable to that high duty, in that remote and peculiar region. The separate and independent rights which the United States was thus driven to assert, were:

First. That she had derived from Russia, with the acquiescence of Great Britain, the exclusive jurisdiction to control and protect the fur seals in Bering Sea.

This claim has been virtually decided by the tribunal, adversely to the United States, and I will not now discuss it further.

Second. It was claimed by the United States Government that it is the owner of the fur seals that are in Bering Sea or that habitually resort to its waters and islands.

Third. That if its claim of ownership of the seals can not be maintained it has a right of protection of seal life, to be exerted, as far as may be, under its separate powers of sovereignty, and if these are inadequate for their protection then it has a just claim that Great Britain will restrain her subjects, in conformity with concurrent regulations which

this tribunal shall determine in its award, from acts that are in hostility to seal life and destructive to it, taken as a whole.

On these questions, I now propose to state my opinion as an arbitrator. I will discuss this matter further in connection with the right of pelagic hunting of fur seals, which is the only human agency that wars upon seal life in the waters of the ocean, and is the right claimed by the British Government as being free and unrestricted, in favor of her subjects.

The claim of protection of and for seal life set up by the United States is, in its most enlarged sense, simply a question of jurisdiction as to which Government shall exercise the power to protect the seal herds outside the territorial limits of both countries. The right of the United States to have such protection is not more real or necessary if it is held to be the owner of the property, than it is, as the owner of an industry which can not exist if the seals are destroyed.

The industry on the islands, as it is conducted by the United States, is, in every sense, legitimate; it is useful to commerce and to other great industries in other countries; it is humane in its methods, and is the only means by which seal propagation can be practiced successfully.

It is the only method that is in accordance with the avowed purpose of both Governments, expressed in this treaty, and in various other solemn utterances, of protecting and preserving seal life in the North Pacific Ocean. But above all this the industry based on seal life is the only valuable resource of living for the people on the islands and coasts of Bering Sea, and if this is lost they must perish, if they remain in their native country, or else they must be fed and clothed from the Treasury of the United States. The preservation of the seals is, therefore, a right and duty of government on the part of the United States, which it owes to and must exercise in behalf of those citizens and can not abandon. The seal industry also yields a revenue to the United States that is valuable and necessary for the support of government in that inhospitable region.

If that country can enjoy the advantage of its only valuable resource—its only production of commercial value—without material interference with the positive rights of the British or any other people, it is the duty of the United States to protect such means of existence and civilization for the benefit of the people there. In the efforts to do this, which have been crowned with the most honorable success, the United States have found it necessary as a measure of government,



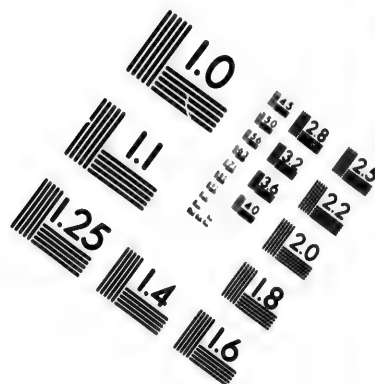
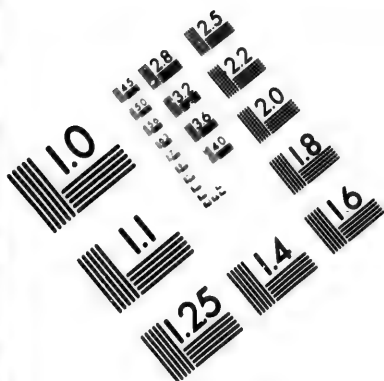
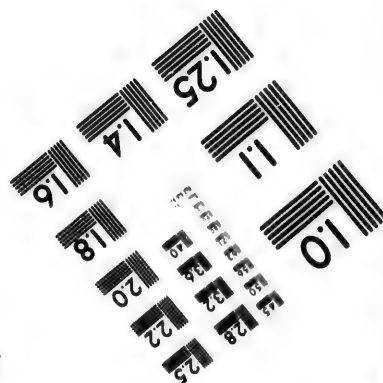
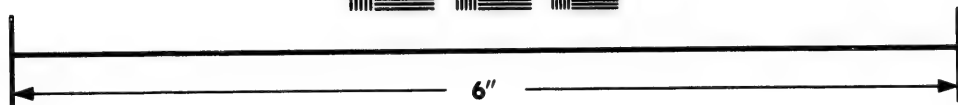
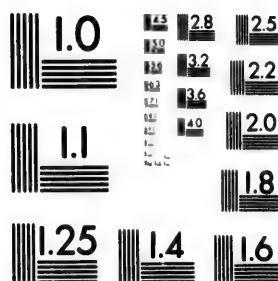


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to protect the seal herd and to indemnify its Treasury by levying a tax upon the pelts of the seals taken under their laws and regulations.

This public and governmental necessity and right is not denied, but if it was, the United States would still be the sole and sovereign judge of that duty. In fact, the revenues so derived are not sufficient to pay all the expenses of administration in the perilous and costly police of the islands and the seas around them for the protection of seal life and the conduct of this industry.

If we turn to the photographic plates produced in evidence, those historians that can not use words to abuse the truth, we see at a glance what it must have cost the United States already to have converted these desolate islands into places of decent abode, and those wretched savages into self-respecting people worthy of a place and a name among civilized and Christian peoples. The United States can not afford to allow these people to relapse into savage barbarity. It can not abandon them to a cruel and destructive fate, and this tribunal can not afford to search for some reason for assisting such a relapse, alone in legal decisions made under municipal laws in England or elsewhere in private lawsuits between private litigants about pheasants and rooks and rabbits. These two Governments have found it necessary, in order to secure justice and peace between their people and to repress a slaughter of useful animals, which is wasteful, destructive, unnecessary, and inhuman, to remove the controversy beyond the reach of the influence of the mere cupidity of men eager for private gain, into the higher plane of a contest between nations. It is no longer a case in which men who are citizens of the United States can accuse their Government of a mean purpose of making illicit gains for its revenues, by a tax on fur-seal pelts, or of aiding a monopoly granted to favorites; or in which renegade citizens can be allowed to abuse the laws of the United States by the surreptitious use of the flag of Great Britain.

These Governments are pledged to find a way, by means of the award the tribunal shall make, to protect and preserve these seals, and they can not and will not permit them again to become the prey of private cupidity. It is only the private greed for gain at any sacrifice of great public interest and duties that calls in question the public right and duty of protecting the seals by international action. To dignify this opposition of the seekers for private gain into a business that rises above the duty of nations towards the peace and prosperity of the world, the reckless and destructive methods of the pelagic hunter are raised to

the plane of the honorable and useful industries of mankind. This is called in the British case and in the arguments of British counsel "the industry" of pelagic hunting or fishing; and it is claimed that it is legitimate trade, in competition with the trade and industry conducted on the Pribilof Islands by the United States. An industry that destroys and exterminates the subject to which it is applied is not deserving of this honorable definition.

But, treating it as a just and honorable industry, will Great Britain, now that it has taken up the duty of preserving and protecting this fur-seal industry on public account, publicly license and conduct fur-seal hunting, in the way and with the destructive effect that it is being prosecuted by its own subjects, and by citizens of the United States who abuse its flag by making it a shelter to protect them against criminal responsibility to their own Government?

Is it true that under this treaty, which leaves this tribunal to deal with these questions as matters that concern justice, peace, and comity between nations, and not as mere private rights, the Government of Great Britain claims for itself, as a government, or for its people, the right to pursue this industry in the present destructive and cruel way in which it has been and is being conducted?

If the strict legal right of pelagic sealing attends and legitimates this industry in all waters outside actual territorial limits, and makes it lawful to surround the seal islands with ships and to kill the animals as they come and go from the islands to the open sea, does Great Britain, *under this treaty*, claim that the right now exists in this unqualified extent, in favor of its subjects, or that it comports with the pledges of *this treaty* that the seals are to be preserved and protected?

Great Britain has taken the right to pursue this industry from the hands of its subjects, on the grounds of public policy and of duty to the United States, and has submitted them to this tribunal for decision.

If the "industry," as it is pursued, is legitimate fishing, and if it could have received the sanction of the British Government, this serious wrong to her subjects in depriving them of it could not have been done.

It is said by counsel of Great Britain that, in the case supposed, of a cordon of ships drawn up around the seal islands, waylaying the seals in the breeding season as they come from and go to the sea for food and killing them indiscriminately, that such an act would be malicious and the United States would treat it as a *casus belli*, within the right of nations under the international law.

The right to give such an interpretation to such conduct means that the industry of pelagic hunting, like all other pursuits, however legitimate, is qualified by the demands of justice that are due to all other nations. The international law neither requires nor sanctions a resort to war for the protection of the plainest rights, if they can be peacefully maintained without detriment or dishonor.

This tribunal can not, in justice to itself, adopt the suggestion that it must leave the industry of pelagic sealing, in view of this treaty and its great purposes, so loosely defined and so free in its privileges and so licensed to maraud upon the rights of the United States, that an assemblage of sealing vessels in Bering Sea, sufficient to destroy the seal herd in one or more seasons, is lawful. If it is malicious it is admitted to be unlawful and that in such case the only remedy is war. In such case the United States, being forced to judge of the evil and to provide the remedy, would, as any court of justice must do, impute the malice to the nature and consequences of the act. This tribunal is authorized to act upon the same presumption in prohibiting this evil.

Following up this right in all parts of the Bering Sea and in the Pacific Ocean, the United States would justly impute malice—a purpose of wrong-doing—to all acts that warred upon its revenues, in respect to fur-seals, during the period of resort to the islands. This action of the United States would find its full justification in the doctrines stated by counsel, which should be adopted in the award in this case. If it would be right to resort to war to prevent or redress such wrongs, the more peaceful remedy can not be contrary to the law of nations.

If we follow the British contention as to the rights of pelagic sealers, and refuse to put any restraints upon pelagic sealing, instead of making an amicable settlement of the controversies that called us together we would leave new and burning questions open between these Governments to be settled by war. It is not to be expected that the United States, if left by this tribunal to the duty of defending itself against the abuse of rights accorded to pelagic hunters, without any restrictions being imposed upon them, will fail to avail itself of the necessary means of doing that duty.

I now turn to other views of this subject which I think are made necessary by what has occurred in this case.

The unrestricted right of pelagic sealing has been supported by the assertion that it is the only way in which a monopoly in the fur-seal

trade, growing out of the ownership of the seal islands by the United States, can be counteracted.

The commercial attitude of the United States towards the supply of the markets of the world with the pelts of the fur-seal, is the same that all countries hold in respect of any valuable commodity that is a peculiar product of the soil or climate. The incentive of commercial interchange, the necessities of the consumers, and the laws of supply and demand are simply left to regulate the outflow of such productions into the open channels of commerce.

If the United States, alone, produced fur seals, the Constitution of that Government, which prohibits all duties on exports, affords a guaranty that no other nation has given against the possibility of a monopoly in the pelts of that animal.

But Russia and Japan yet remain as active competitors in this and other branches of the fur trade, and their care of this industry and the distance of their sealing islands from the coasts of Canada and of the United States and the difficulties of navigation in their seas are likely to preserve a large proportion of their seal herds from destruction for many years to come. Many peltries will be thus supplied to commerce, in competition with those that are taken by the United States.

If the regulations of seal hunting, that are found necessary by this tribunal to preserve the species, are adopted by those Powers along whose coasts and islands the fur-seal formerly abounded, the number of these animals will again increase in the southern hemisphere until the world will have, again, an abundant supply.

The course of the United States in reference to the care and nurture of seal life is directly opposed to the engrossment of this product in the way of monopoly. On the contrary, that Government has shown its anxiety to preserve and increase the stock by its regulation of killing on land, by forbearing, during three seasons, from taking seals in excess of 7,500 which were reserved for the support of the natives, and by reducing the number of seals that the lessees were entitled to kill from 100,000 to 60,000 per annum, at the possible risk of pecuniary liability to the lessees.

Besides this, the expense of agents and superintendents of the islands and of guarding them from the raids of poachers, is very considerable.

It is difficult to conceive that a government could have done more, or could have acted in better faith towards other powers, in a matter where there is an acknowledged public trust arising from its possession of the seal islands.

Tariff duties that prohibit or strongly tend to the exclusion of imports, so as to benefit the special industries or productions of a country, are in the nature of monopolies of the home markets and are generally enforced by enlightened governments. And they do not stop to inquire as to the injuries that such laws may entail upon other countries.

Tobacco is not extensively produced in Europe, and several of the European governments purchase the stock, chiefly from America, and manufacture and sell it on government account, and fix the prices that consumers, in those countries, must pay for the manufactured article. This monopoly works an injury to manufacturers in America, but no one has thought to make complaint against the governments that create it, in respect to an American production. In this important matter the Congress of the United States has no power to protect the producers of tobacco or the manufacturers by an export duty on tobacco.

Many other instances of monopoly of trade could be cited to show that it is essentially a power of government which any nation may rightfully employ to provide for its revenues and the welfare of its people.

There is, really, no conceivable case or condition connected with the industry of the fur-seal fisheries in which the United States could monopolize this trade, except by destroying, as rapidly as possible, the seals on the islands. When a government finds it necessary to protect these animals against its own people, as well as against those of other countries, by assuming to itself their exclusive ownership, a monopoly is the inevitable result and it is indispensable to the safety of the property. This sort of monopoly is a part of the duty of government and of its legitimate powers.

It is both the right and the duty of the United States to assume and to exert ownership over these animals, in order to extend to them the protection that is due to useful domesticated animals. The legislation of nearly every government upon whose shores or islands fur seals resort habitually for breeding purposes assumes over them a government control for their protection and the right to raise revenue out of them, which is based on the right of appropriating them to governmental uses and purposes, so that all those governments are in that sense, monopolists. Such control can not be less than an assertion of a right of property, for it prohibits all persons from asserting a claim to them on private account, and it makes them a source of revenue. These may be justly called laws for the domestication of the fur seals—

laws for converting them into property as domestic animals. They differ from game laws, which protect wild animals in order to secure a greater supply for the common use.

All this legislative tendency indicates, in the plainest manner, a consensus of opinion and a common movement in the direction of classifying fur seals as domestic animals in respect to their protection by positive laws: Why this universal sentiment should only be resisted by Canada for purpose of assisting her people in making selfish gain, is an inquiry that only gives point to the suggestion that the international law should conform to the general municipal law on this subject.

The careful examinations and reports of many eminent naturalists, supported by a general and distressing experience as to the extinction of the fur seals, first in the southern hemisphere and now in the northern, has set the local lawmakers to work in contriving statutes to stop these destructive practices and to restore the herds to their former status. All these laws are based on the fact that government control of the seals is necessary for their preservation, and that the seals are entitled to the same protection of the law, suited to their nature, as other domestic animals.

As this subject is now presented for the first time to an international tribunal, and in a controversy between two great powers, and as the origin of the questions so presented is of a very recent date, and as no direct precedent or discussion exists to guide or control the judgment of this tribunal, a proper occasion is presented for declaring that these animals should have the same classification under the international law that they have under the municipal laws of all countries that furnish a resort for the fur seals during their period of compulsory living on land. Such a declaration would not create a new rule of international law; it would only apply the rules that may now be termed universal law, in municipal legislation, to that area of the earth's surface in which there is no supreme law, because there is equal sovereignty in all nations, and would include in those rules the preservation on the high seas of animals that are so serviceable to man as to deserve to be classed as domestic animals. All useful animals are subjected to domestication by the divine decree that gave to man the dominion over the beasts of the field and the birds of the air.

Laws for the protection of animals are elaborately provided and are made cardinal features of all civil codes and of the moral code of the Pentateuch. This benign system has expanded from age to age so as to admit within the circle of domesticated animals, that are protected

by laws, all that have been found of common use for food or raiment, and are, by their habits, capable of identification with reference to separate ownership, such as shell-fish yielding pearls, oysters, clams, corals, sponges, etc., and a large number of animals that were not so classed until within a recent period.

The tendency has been uniform to enlarge the scope of the laws so as to include all animals within the classification of domestic animals, as occasion has presented, and no animals have been permitted to be relegated to a classification as wild animals, that have been once included in the protection extended by the laws to domestic animals. Any other rule of action would deny to all new conditions that are valuable, the protection of the principles of international law.

The domestication of animals by general usage, or by law, attaches to them the presumption that they are exempt from slaughter at the will of anyone who may choose to kill them. Within the field of operation of such laws, such animals are protected as all domestic animals are protected. Outside that jurisdiction, they are protected by comity, or by the application of principles of international law, derived from municipal laws, or else from the sentiment or the necessity that lies at the foundation of municipal laws.

Those principles are justly founded on the general usefulness of the animals to mankind, and the consequent necessity for giving them protection. The international law should attach to them the same presumption of domesticity that is attached to them in such cases by the municipal law.

In matters like those submitted to us the opportunity occurs for a formal declaration, which, by treaty agreement, is made obligatory upon two great powers, of the relation that these animals should bear to the question of their preservation, in the international law. That relation is uniform and unbroken, except in the laws and usage of Canada, in all the legislation of all the municipalities that have any interest in the subject. It is nothing less, in effect, than a declaration of those legislatures that fur seals, by reason of their value, their helplessness to resist or escape from the power of man during a large part of every spring, summer and autumn, their docility and the absolute necessity of giving them that protection by positive law that nature has denied to them, should be classed and are entitled to be classed in *favorem vite*, as domesticated animals.

I can not understand how it can be possible, in view of the facts, that

this Tribunal should declare that they are wild animals in contemplation of law, and shall have no more shelter against the greed of man, assisted by his genius in the invention of instruments of destruction, than they have against the killer whale. That their only protection shall be their capacity, in the water, to escape pursuit, out of which element they must spend nearly half the period of their lives, is too imperfect a shelter for such a valuable contribution to commerce as these animals yield, to receive the sanction of the great commercial nations.

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REGULATIONS.

THE TRIBUNAL, HAVING DECIDED THE OTHER QUESTIONS SUBMITTED TO THEM UNDER THE TREATY, PROCEEDED TO THE CONSIDERATION OF THE SUBJECT OF PROPER REGULATIONS FOR THE PROTECTION AND PRESERVATION OF FUR-SEALS IN THE NORTH PACIFIC OCEAN, INCLUDING BERING SEA.

On this topic Mr. Senator Morgan delivered the following opinion:

I have heretofore insisted that when concurrent regulations are adopted they will be the result of the power of the Tribunal to agree upon and stipulate a feature of the treaty, in respect of pelagic hunting of fur-seals, as between the two Governments; as much so, as if the regulations had been formally agreed upon and written into the body of the convention under which we are acting. I understand that this point is agreed to on the part of all the Arbitrators, and I so state it.

(2) The Arbitrators, in the exercise of these powers, must act as impartial negotiators, as they hold their authority from both the High Contracting Parties, under the treaty; and, their award being final, it is sanctioned and sustained, if it is within the purview of their authority, by the sovereign powers of both Governments, pledged in the treaty in advance of the decision of the Arbitrators. I also understand that this point is not disputed.

(3) The regulations we shall adopt are in no sense judicial decisions, though they are based upon principles of law declared by the Tribunal, nor is the power, or duty, of making them, so as to protect and preserve the fur-seals, restrained or controlled so as to conform to the personal interests of pelagic hunters or the national interests of the United States. The two Governments have removed such considerations from the scope of our duties by assuming absolute control of the entire subject, which was found necessary to be done in order to properly protect and preserve the fur-seals in the interests of commerce and humanity. In like manner they have excluded from our consideration,

according to the decision of the Tribunal, the question of gain or advantage to the United States, as a Government, resulting from the preservation of seal life.

The *modus vivendi*, established for three consecutive sealing seasons took the highest possible governmental authority over the fur-seals in Bering Sea, and during those seasons prohibited all pelagic sealing in those waters. This is a virtual declaration that fur-seals, while swimming freely in the ocean, are capable of being treated as property and are subject to the care of the two Governments.

The last of these agreements is incorporated with and made a part of the treaty of February 29, 1892.

(4) The true attitude of the question we are now to consider is simply this, to use the language of the treaty: "The arbitrators shall then determine what concurrent regulations outside the jurisdictional limits of the respective governments are necessary, and over what waters such regulations should extend," "for the proper protection and preservation of the fur-seals in or habitually resorting to the Bering Sea."

It is not possible that the power to determine regulations to operate outside the jurisdiction of the two Governments, which can only include pelagic sealing in the waters of the Pacific Ocean and Bering Sea outside the territorial limits, can be so stretched, without a bold usurpation, as to include the killing of seals on the land.

It is quite as impossible to suppose that either government intended that by concurrent regulations this Tribunal could provide laws for either Government that should operate as laws within the actual boundaries of the other.

When the power is given only to determine "over what waters such regulations should extend," it is not possible to conceive that the Tribunal has the power to determine over what lands or islands they shall extend. This power is so clearly withheld from this Tribunal by the treaty that its exercise would be *ultra vires*, in any form or for any conceivable purpose.

So that we have in the body of this treaty the statement and actual enforcement of the power of the British Government to dismiss from consideration the personal rights of its subjects, under international law, in respect to pelagic hunting, and the assumption by that Government of supreme and absolute control over them and their rights. All this was done for the purpose of making the matter of concurrent reg-

ulations a question between the two Governments, *to be controlled by the mutual international policy of protecting and preserving the Alaskan seals, as to which purpose both Governments are in accord.* They agree as to the national duty of both Governments to protect and preserve these fur-seals, and have only disagreed as to the rightful and best method of executing this duty.

(5) There is no mistaking the exact nature and extent of the power conferred on this Tribunal. It is simply the power to determine concurrent regulations for the proper protection and preservation of the fur-seals in or habitually resorting to Bering Sea, and to designate the waters that should be included in such regulations.

If this Tribunal bases its award upon the effect that such regulations are to have on the rights or profits of pelagic sealers, they rebuke both Governments for having assumed the whole responsibility of that subject, and for having retired from view the private rights of their citizens under the international law, and for having subjected them to such municipal laws of the respective Governments, to be enacted in conformity with the award, as shall accord with the avowed public policy of those Governments to preserve and protect the fur-seals.

These Governments have not invited us to decide how far this policy, mutually agreed to and declared in the most unequivocal terms, shall be obstructed by our efforts to take care of the interests of their citizens engaged in pelagic sealing. They have assumed that duty and will doubtless respond to it.

Both Governments would rejoice if the preservation and protection of the seals in question would admit of the greatest extent of pelagic hunting by their citizens consistent with the prudent and humane treatment of these useful animals. But they carefully considered that question and appointed a joint Commission to make examination into all its bearings. That Commission made a joint report before the treaty, signed February 29, 1892, had been ratified by either Government, in which they say: "5. We are in thorough agreement that, for industrial as well as for other obvious reasons, it is incumbent upon *all nations*, and particularly upon those having direct commercial interests in fur-seals, to provide for their protection and preservation;" and further, they declare that—"7. We find that, since the Alaskan purchase, a marked diminution in the number of seals on, and habitually resorting to, the Pribilof Islands has taken place; that it has been cumulative in effect, and that it is the result of excessive killing by man."

These two Nations, acting on this report and upon other ascertained facts of the gravest character, *took the subject into their own hands* and provided for the determination of concurrent regulations by this Tribunal, to operate outside the jurisdictional limits of the two Governments, on the water and not on the land, for the protection and preservation of these fur-seals.

The subject of regulating the seal herds on land was not mentioned between the Governments in their negotiations, nor in the treaty; doubtless for the reason that Great Britain saw that it was the interest of the United States to protect and preserve the seals and to promote their increase, and had no cause then or since to doubt the good faith of the United States in the use of every means that would contribute to that end.

"The excessive killing by man" that the Commissioners agreed to report could not have been the killing by the United States on the islands of St. Paul and St. George; otherwise, that fact would have been mentioned and made the subject of negotiation.

The protection and preservation of the seals against excessive killing, is the killing upon the waters outside the jurisdictional limits of both countries. It is beyond a reasonable doubt that it was pelagic killing that was considered by the United States and Great Britain as being so destructive to seal life as to make it incumbent upon *all nations* to provide for their protection and preservation, and was especially the duty of these two powers. To do this, these Governments agreed with each other to place this question upon the high and just ground of international duty, disregarding the profit that might accrue to the subjects and citizens of both countries from the indiscriminate slaughter of the fur-seals, or to the United States from preserving and increasing the number of fur-seals.

(8) This Tribunal is to make regulations that apply to this herd *in its present condition*, and not with reference to some former condition.

The most conspicuous fact in the present situation, and the dangerous fact of the inevitable future, is this, that the fur-seals will disappear rapidly if the pelagic hunter is able to make that business profitable on the sea and to make it unprofitable on the Pribilof Islands. *Either of these results will destroy the fur-seals rapidly, and both of them would make the destruction sudden, and that without remedy. And if one result ensues, the other must follow speedily.*

This treaty also requires this Tribunal to consider and decide concern-

ing the rights of the subjects and citizens of either country as regards the taking of fur-seals in or habitually resorting to Bering Sea. Whether this question has been decided or remains to be decided the Tribunal has not yet come to any resolution. That subject, though I have demanded its separate examination and decision, has been passed over by the Tribunal, but in either case I will assume that their rights must be equal and that there will be no discrimination between the people of the two countries as to such rights.

If the right is given them by this award to scour the North Pacific Ocean and Bering Sea at all seasons of the year, with all descriptions of firearms except rifles, and with such number of vessels as may be tempted into the business by its profits, assisted by steamers to carry off the catch so as to keep the hunters steadily employed in killing seals, it will not be possible for the Congress to prevent the citizens of the United States from sharing in the raids upon the seals equally with British subjects. I mean that the people of the United States would withdraw their support, as they should do, from any body of representatives that would tolerate such an injustice, and all seal hunters and many thousands who are not, would rush in to destroy them as they did in 1868.

We can not expect to impose upon the United States the duty of keeping up this expensive and harassing plan that it now maintains in good faith and perfect honor for the preservation of the fur-seals when we condemn the seals to certain destruction in the face of the avowed policy of both countries that they should be protected and preserved.

We can not expect the United States to maintain its prohibition of pelagic sealing in Bering Sea as to its own citizens when we enjoin it upon that Government, as a moral duty and a treaty obligation, to repeal her laws as to restrictions upon British subjects in that sea.

This is what the United States must do, under concurrent regulations framed upon the plan of Sir John Thompson, or else it must violate the spirit of the treaty, if not its letter, as it is to be declared in such an award, because of the disadvantage to its own people. We can not thus condemn the policy of the United States in its faithful efforts to preserve seal life, and expect that Government to maintain its rigorous laws against its own citizens.

If we extend an invitation to other nations to enjoy equally with Great Britain and the United States the looting of the seal herd in the North Pacific and in Bering Sea, we pledge the honor of these

Governments that they will sustain the rights of all nations, both in a moral and national sense, in like invasions of the herds of Russia and Japan.

The flag of the most insignificant power in the world will have the pledge, through such an award, of perfect immunity and protection while raiding the North Pacific Ocean and Bering Sea with all implements of destruction, not excepting any, and in such number of vessels and of such tonnage and description as they choose, not excluding steamers, and without having a license or a distinctive flag.

A recent event has demonstrated the fact, if it needed any demonstration (as it does not), that the little kingdom of Hawaii will, through the help of renegades of the United States and Canada, grow rich in renting her flag to them in order to take advantage of the scheme presented here by Great Britain as her project of regulations. Why these two Governments should thus create such a destructive fatality to seal life through the award of this Tribunal while professing the wish and purpose of protecting it is quite beyond my ability to comprehend.

The regulations submitted by the respective Governments for the consideration of this Tribunal must be regarded as their official statements of the basis and plan of settlement proposed by each, and not as the ultimatum of each Government, between which we are to choose by accepting the one and rejecting the other. And, as no plan or formulation of regulations is stated in the treaty or alluded to, this subject is left to the judgment of this Tribunal, which is at liberty to discard both schemes or to adopt regulations that neither Government has suggested. The only limitations on the power of the Tribunal in this regard is, that the regulations shall be concurrent and, therefore, uniform as to both Governments, that they shall relate to waters that are outside the jurisdictional limits of either Government, and that they shall be "necessary * * * for the proper protection and preservation of the fur-seal in or habitually resorting to Behring Sea."

The treaty also furnishes a guide as to the general nature of the regulations, that they should be such as to claim, for their international support, the adhesion of other powers to such regulations.

It will be observed that the invitation of the two Governments to other powers, that they will give their adhesion to this treaty, relates only to the regulations we are to provide. It has no relation to any other part of the treaty. The object of this invitation was not so much to prevent other powers from encouraging pelagic sealing in Bering Sea,

or the North Pacific Ocean, as it was to obtain their consent to regulations that would preserve and protect fur-seals in the waters in which they are found anywhere in the world, if they are generally adhered to.

No nation except Great Britain has found itself interested in the hunting of the seal herd that resorts to Bering Sea. The people of other nations have not carried on pelagic sealing in that herd, or in the waters of the North Pacific or Bering Sea. If the regulations that we adopt are founded upon or modified by the peculiar interests of Canada, or the United States (as is proposed in the British case), the other powers will find that they are in no sense international, but are entirely local; that they adopt no general principle of action for the protection and preservation of fur-seals, but are only an expedient devised to get rid of a particular controversy between the United States and one of the provinces of Great Britain. We could not ask other powers to adhere to regulations based on grounds so narrow and selfish. It would be in effect only a request that they would agree not to interfere with this herd of seals while they are being divided, according to an award of this Tribunal which apportions them between the United States and Canadian sealers.

The regulations presented by Sir John Thompson appear to be based upon the recent *modus vivendi* agreed upon between Russia and Great Britain, to which the attention of the Tribunal has been called. Russia appears to have accepted that arrangement as a mere temporary check upon the aggressions of the pelagic sealer, and has accompanied it with reservations and protestations that show her extreme unwillingness to adopt it as the final definition of her rights.

If the award of this Tribunal should thus conform to the plan adopted in the Anglo-Russian *modus vivendi*, it will either force Russia into terms of final agreement with Great Britain that she would not otherwise adopt, or it will show a wide distinction between Russia and the United States in treating with Great Britain about a subject of the same character, and in reference to the same body of waters. Russia could not finally adhere to the regulations proposed in the programme presented by Sir John Thompson, without agreeing to all that Great Britain is demanding of her, against much of which she is firmly protesting.

Before stating the form of regulations to which I would prefer to give the support of my voice in this Tribunal, I will state some conclusions of fact that I have drawn from the evidence as to the

character of the regulations which are necessary to execute the purpose of both Governments to preserve and protect the fur-seals of the Alaskan herd, and that would also answer a beneficent purpose in accomplishing the universally declared wish of all nations interested in the subject of protecting and preserving seal life, and in repairing the damage that has been inflicted upon it by raiders in the absence of governmental protection. This, I take it, is the real ground upon which other powers are to be invited to give their adhesion to the regulations that this Tribunal may determine and award as between Great Britain and the United States.

The regulations, like all enactments of laws that are remedial in their character, are to be framed with a view to giving relief against an existing evil, and this can only be wisely and justly accomplished when the nature and extent of the evil is first ascertained. When that is done, the nature of the evil suggests the character of the remedy, and we can not frame the remedy that we are to provide so as to merely check the evil for a time, leaving it to burrow and work its havoc at a date that is more acceptable only because it is more distant from us. The occasion requires a just, serious, and firm attitude as to a question of great importance to the whole world.

I will now state, as I gather from all the evidence before us, what is the evil that these Governments have found to be so threatening to seal life in the Alaskan herd as to draw them into an agreement that it should be repressed by their concurrent action.

I will not attempt to examine again the details of the evidence, so thoroughly presented and with such judicial impartiality, by Mr. Justice Harlan. I can find no flaw or omission in his careful statement of the evidence, or in the conclusions that he drew from it as to matters of fact. I believe that he stated the exact truth of the situation, and I fully concur in his treatment of the subject and in the conclusions that he has reached.

The present situation, as I understand it, is as follows, as shown by a comparison of the Pribilof and pelagic catches:

Year.	Pribilof Islands.	Total pelagic catch.
1890.....	21,234	51,655
1891.....	12,071	98,000
1892.....	7,500	73,394
1893.....	7,500	*80,000
Total.....	48,305	273,049

* Estimated.

In 1889 the Pribilof catch was 102,617, which fell off to 21,234 in 1890, and this was all that the islands would yield of killable seals, leaving a deficit, as compared with the previous year, of 81,379 seals upon the islands. If this contrast in the number of seals that could be taken on the islands in 1889 and 1890 was due to the overkilling of males on the islands, and not to pelagic hunting, the falling off of numbers would have been indicated in each of the six years prior to 1889. No one has asserted such a fact, and we know that a male seal must be 2 years old before he is able to take up and maintain a harem on the rookeries. So that this sudden falling off between 1889 and 1890, if it was due to an excessive killing of males, must have occurred at least as early as 1882. This is not true, and no one pretends that it is. The killing of 51,655 seals that the pelagic hunters got, and at least three-fold that number, including those that were lost, must have reached 300,000 seals that were destroyed. Of this number, three-fourths were females, that are not killable seals on the islands, and are not counted in the Pribilof catch.

The verification of this calculation is almost perfect in 1892, when the pelagic sealers took 73,000 seals, and in 1891 when they took 68,000. The close approximation of these figures shows that the loss of the seals on the islands was due to pelagic sealing, and not to the want of virility in the bulls on the breeding grounds, or to any other cause.

That the process which has actually depleted the seal herd in four years to the extent of 569,065 (273,000 of which were females), *is an* that requires to be remedied, for the sake of the protection and preservation of seal life, no one can doubt, as it seems to me. This progressive depletion of this herd of seals can not fail to destroy them very soon, and, in the meantime, to deprive the United States of all possible advantage and compensation derived from its efforts to save the species. What the United States has done, or omitted to do, to deserve treatment at the hands of this Tribunal that will expose its lawful industries to ruin, its revenues to depletion, and its wards on the Pribilof Islands to the loss of their only valuable industry will be an inquiry that will seriously challenge the justice of such an award, in the estimate of the civilized world.

The evil to be provided against by this Tribunal is, clearly, *pelagic sealing with firearms.*

If there is, or has been, any detriment to the seal herd from the

treatment of the United States, on the islands, the facts on this subject were not unknown to Great Britain when the treaty was made and before ratifications were exchanged. This subject was not referred to in any of the correspondence between the Governments, and the treaty is silent as to this supposed mismanagement.

Will the Tribunal, in such a case, make an objection to protecting and preserving the fur-seals on the water because Great Britain has not thought it proper or necessary to call the methods into question, or the United States into account, for its manner of dealing with that subject on land? True, if it can be shown that the depletion of the herd is due to that cause, and not to pelagic hunting, that is a just and proper inquiry. If it is due to both causes, this Tribunal will deal with *the pelagic evil, that is submitted to its consideration*, and leave it to the nations concerned in the protection of seal life *to deal with the evil on land*.

If the United States are not so wise in caring for the seals on land as the pelagic hunters are in caring for them at sea, as seems to be asserted, they are quite as earnest in the wish to do so. They destroy no female seals; while the pelagic hunter never spares one. They do not fire upon the breeding rookeries when the seals are massed, many of them asleep, with double-barrelled shotguns and buck-shot cartridges. They do not kill indiscriminately all seals that come in sight.

The United States permit no female seals to be killed; while 75 per centum of those killed by the pelagic hunter are females heavy with young and almost helpless.

In that condition, as well as in accordance with a law of their nature, which is an important fact in connection with their domesticity, the female fur-seal require a great deal of sleep. When asleep, they turn upon their backs, fold their flippers over their breasts, and curving their hind flippers upwards, they form of their bodies a sort of boat, the spinal column representing the keel. They can only breathe the upper air; they can not, like a fish, extract air from the water. While sleeping their noses are above the water. After inhaling the air the nostrils close firmly together, and the air, heated by their bodies, expands and buoys them up. They seldom breathe oftener than once in fifteen minutes, and, when diving, they need not return to the surface for air oftener than every thirty minutes. We know nothing of their habits at night while in the ocean. On land they are so boisterous at night with their howlings that sleep would seem to be impossible, except

from sheer exhaustion. They have not a keen vision, and the sunlight is painful to them, so that they leave the land and go to sea on days that are bright. This causes them to seek a summer home in a place where fogs and rains prevail. Yet they must have warmth. Nature has amply provided for this necessity by giving them a double coating of thick, strong hair, and of the thickest and finest fur that was ever bestowed upon any species of animals. It is as impervious to water as the down of an eider duck. The pups are born without this fur, and hence their aversion to swimming until it has grown out; and this detains them on land for four months, at least, during which period they can subsist only on the milk of the cow seals. While their vision is not keen, their auditory organs and sense of smell are exceedingly acute. They are attracted by sounds as few other animals are. In this faculty they make a close approach to the endowments of mankind. Sir John Thompson is amused at an account, read by Mr. Justice Harlan, of the seals being attracted in great numbers near to the shore at Hoy by the ringing of a church bell. In his incredulous sport over this incident Sir John forgot that it is the personal observation of Mr. Low, one of the greatest naturalists who ever lived, the friend and companion of Cuvier, and is more than confirmed by M. Peron, whom France has honored in the most conspicuous way. His abilities as a naturalist, acquainted intimately with seal life, are as far in advance of those of Prof. Elliott, from whom Lord Hannen quotes with much satisfaction, as Napoleon was in advance of the Sioux chieftain, Sitting Bull, as a military genius.

I will presently quote something further about fur-seals from Mr. Peron.

I know Mr. Elliott, whom the British Government has dubbed "professor." I have respect for his character and sprightliness. He is a painter in water colors of no mean pretensions, but his use of color does not stop with his canvas. It enters into all he says, and makes him too vivid an enthusiast for a safe reliance on questions of measurements, statistics, and cold facts. Mr. Elliott was out on the Pribilof Islands on the 10th of July, 1890, taking field notes, which, to be of any value, should be free from all romantic conjecture. The following is one of his highly colored extracts taken from his report of that day:

In company with Mr. Goff and Dr. Lutz, I made my plotting of the breeding seals as they lay on the Reef and Garbotch to-day.

Here at the very height of the breeding season, when the masses

were most compact and uniform in their distribution in 1802-'74, I find the animals as they lay to-day, scattered over twice and thrice as much ground as a rule, as the same number would occupy in 1872—scattered because the virile bulls are so few in number and the service which they render so delayed or impotent. In other words the cows are restless; not being served when in heat, they seek other bulls by hauling out in green jagged points of massing (as is shown by the chart), up from their landing belts.

This unnatural action of the cows, or rather unwonted movement, has caused the pups already to form small pods everywhere, even where the cows are most abundant, which shadows to me the truth of the fact that in five days or a week from date, the scattering completely of the rookery organization will be thoroughly done; it did not take place until the 20th-25th July, 1872.

In 1872, these cows were promptly met with the service which they craved on the rookery ground. The scattering of these old bulls to-day over so large an area, is due to extreme feebleness and combined in many cases to a recollection of no distant day when they had previously hauled thus far out on this very ground surrounded by bareness, though all is vacant and semi grass grown under and around them now.

The fur-seals, so well provided against cold, are yet so sensitive to its effects that they go south at the approach of winter and seek their food in the great river of warm waters that comes from the tropical coast of Asia and pours its flood across the Pacific Ocean. It bears enormous treasures of fish food, and swarms with schools of herring, salmon, and squid. The migratory fishes, that naturally feed against the current, pursue the track of this warm river in the ocean and ascend it. This leads them to the northern coast of the United States, and thence around the great curve which this river has formed on the coast, past British Columbia, to the south of the Alaskan peninsula. The fur-seals, finding warmth and food in this ocean current, enter it when they quit the breeding islands and Bering Sea, in November, and must stay in the broad expanse of warm waters, where it ceases to flow, during a considerable part of the winter. There they remain in search of the herring and other vast schools of migratory fishes that are surface swimmers and feeders, and they follow them on their way to the spawning grounds, as the seals return to their summer abode on the islands to the north of the Aleutian peninsula, where the Arctic current and the Asiatic river meet.

Around the great curve I have mentioned, this ocean current sets in close to the shore, flowing southward, and its warm waters make the winter climate in those high latitudes and altitudes nearly as soft and genial as that of Ireland, and for the same reason. The seals are thus drawn into numerous large assemblages or schools near to the western

coast of North America, and are in easy reach of the "industry" of pelagic sealers.

They must travel a great deal in the night time. In this they are guided and protected by their sense of hearing and smell, and, like the cat, they are provided with several rows of whiskers that are very sensitive and that admonish them of danger in places where they can not see their way.

The gravid females must necessarily spend a large part of each day in seeking food, and do not travel so fast as the male seals. Their exertions are necessarily very taxing to their strength and require them to sleep frequently during the day.

I have made this statement of facts and conclusions, as I draw them from the evidence, to support the further conclusion of fact, which, I think, is unavoidable, that the war upon the gravid female seals is like a war upon the women and children of a nation, which all, except the most depraved of savage nations, abhor. True, these are beasts; but they are harmless, docile, useful beasts, and very helpless, and when they are denied any more protection by the supposed law of nations against the mercenary ferocity of the pelagic sealer than is given to tigers or serpents, while I am empowered to vote in this Tribunal, which is now their only protector, I must vote at least to disarm the pelagic sealer of his double-barreled shotgun, or else to confine his warfare to an area of waters and to a close season where his powers of destruction will not exterminate the race.

If I could find no better reason for restraining the pelagic hunters from the use of double-barreled shotguns in their "sportsmanlike" business of killing gravid females and nursing mother seals in order to earn \$10 a piece from each pelt, I would join my voice with that of every respectable legislature in the world in their careful and highly penal enactments for the prevention of cruelty to animals, and would at least put the female seals under the protection of proper regulations to be awarded by this Tribunal.

On this point I will quote from *The Naturalist's Library* (p. 81), which thus describes the cruelties inflicted upon these valuable, docile, and harmless animals:

Before proceeding to make the few remarks which our limits allow on the valuable products derived from these animals, we would say a word or two upon their capture. They are exceedingly tenacious of life, and many cruelties have been perpetrated upon them, which most who have witnessed declare to be too horrible for description, and over which we willingly draw a veil. If life is to be sacrificed, there is a

right way of taking it as well as a wrong, and we insist that the former should be followed and the latter avoided. Before, however, entering upon this topic, we take leave to remark that it is impossible to investigate, as we have done, the natural history of these animals without discovering how much their capture has been made a matter of mere amusement and, as it is familiarly but emphatically called, of *sport*. We venture to denounce all such sports as both indefensible and wrong. Animals have been given to provide for the necessities and comforts of man, but not that he may gratify himself with their dying agonies; and he is wholly inexcusable if even here he breaks the golden rule of doing as he would be done by. Sporting with the feelings, and pains and lives of these creatures has a strong tendency to lead to cruelty and wickedness; and, therefore, this inherent tendency should be checked in the bud and invariably opposed. When we witness, says Peron, a thoughtless sailor hastening for his amusement, club in hand, into the midst of a great herd and surrounding himself with their dead bodies, we can not but sigh over this improvidence and cruelty which lays low so many peaceful, gentle, and unhappy beings.

While I have the book in hand, I will read other extracts in relation to the docility of the seals, on pages 73 to 77:

At a particular season of the year, every male, inflamed with lust, and jealous almost at its shadow, lords it over his numerous harem with even more than eastern despotism, and thereby throws the whole community into a state of the highest excitement and agitation. During this period, which continues for months, many a jealous Bashaw, as these animals have not inaptly been designated, engages in fearful strife with a rival; the contest is often long and obstinate, as well as most sanguinary and fatal. Nor does it end with these doughty champions. Other males soon imagine that their interests are involved, or their rights invaded, and the strife spreads from family to family, till at length the whole community is involved in one general *mêlée* of passion and rage, of fierce cries and groans, of blood and death; and, after all, short is the triumph of the conqueror, and deep and poignant the chagrin and malice of the vanquished.

Originally, and therefore we are disposed to hold that naturally, these amphibia, far from having a dread, have rather a reposing confidence in man. When a young one by an accident is separated from its parents and comes in contact with man, instead of shunning it courts its company. It will follow him, and if the finger be held out will suck it like many domestic animals. Through the kindness of Prof. Trail we can illustrate this trait in their mental constitution by an interesting incident of which he was a witness, and which, with several other anecdotes, we can, through his polite attention, record in his own words: "A little islet in Orkney, called the Holm of Papa Westray, had long been a favorite haunt of numerous seals, which had become more than usually tame from the care of the proprietor of the adjoining island to prevent their being molested. On visiting that gentleman in 1833 I found the seals exhibited their wonted confidence in those who approached their protected haunt. Several of them swam along the shore as a party of six or eight persons walked along the beach, and did not in general keep farther from us than 30 or 40 yards. When we turned so did they, and when we reentered our boat they followed it in the narrow channel that divides Holm from the island of Papa. Seals are said to relish music, and a seal hunter once informed

me that the sound of a flute will allure them to a boat; but in the above instance it was merely the consequence of no gun being ever lifted against them in that islet which has won their confidence in man." Nor is this characteristic less strikingly exemplified by an observation made by Mr. Dunbar, the present incumbent of the parish of Applegarth, during his residence at a former period in one of the Hebrides. In a letter to Mr. Lizars, which appeared in the last volume of the *Naturalists' Library*, we find the following statement: "While my pupils and I were bathing, which we often did, in the bosom of a beautiful bay in the island named, from the circumstance of its being a favorite haunt of the animal, Seal Bay, numbers of these creatures invariably made their appearance, especially if the weather was calm and sunny and the sea smooth, crowding around us at the distance of a few yards, and looking as if they had some kind of notion that we were of the same genus with themselves. The gambols in the water of my playful companions and their noise and merriment seemed, to our imagination, to excite them and to make them course round us with greater rapidity and animation. At the same time the slightest attempt on our part to act on the offensive, by throwing at them a stone or shell, was the signal for their instantaneous disappearance, each as it vanished leaving the surface of the water beautifully figured with a wavy succession of concentric circles."

In the previous paragraph allusion is casually made to the notion that these animals are not indifferent to the charms of music, whilst we believe it may be safely affirmed that this assertion is more frequently made than credited. The statement, however, appears to be perfectly correct; and the following quotations, the former from the celebrated Orkney naturalist, Law, and the latter from Mr. Dunbar just quoted, are sufficient to banish all skepticism on the point. "If people are passing in boats the seals often come close up to them and stare at them, following for a long time together; if people are speaking loud they seem to wonder what may be the matter. The church of Hoy is situated near a small sandy bay much frequented by these creatures, and I observed when the bell rang for divine service all the seals within hearing swam directly for shore, and kept looking about them, as if surprised rather than frightened, and in this manner continued to wonder as long as the bell rang."

And again Mr. Lizars's correspondent: "The fondness of these animals for musical sounds is a curious peculiarity in their nature, and has been to me often a subject of interest and amusement. During a residence of some years in one of the Hebrides I had many opportunities of witnessing this peculiarity, and in fact could call forth its manifestation at pleasure. In walking along the shore in the calm of a summer afternoon a few notes of my flute would bring half a score of them within 30 or 40 yards of me; and there they would swim about, with their heads above water, like so many black dogs, evidently delighted with the sounds. For half an hour, or, indeed, for any length of time I chose, I could fix them on the spot; and when I moved along the water edge they would follow me with eagerness, like the dolphins who, it is said, attended Arion, as if anxious to prolong the enjoyment. I have frequently witnessed the same effect when out on a boat excursion. The sound of a flute or of a common fife blown by one of the boatmen was no sooner heard than half a dozen would start up within a few yards, wheeling round us as long as the music played, and disappearing one after another when it ceased."

Again I read from the same volume to prove what I have said about the sense of hearing, touch, and smell that seals possess (pages 65 and 66):

The truth is, the eye of the Amphibia is a perfect study and would well repay a lengthened description. It is very large and quite spherical; sclerotic or outer membrane is very peculiar, inasmuch as it has a soft and thin zone around its middle, thickly covered with muscles, whilst both before and behind it is thick and almost cartilaginous. The precise use of this structure has not yet been discovered, though Blumenbach has thrown out the idea that it may enable the seal to see both in air and water. Rosenthal so far confirms this opinion by having observed that the mechanism is peculiar to those animals which live in a dense medium, such as water; that the remarkable thickness of the coat is found in those animals in which the orbit is not wholly osseous, and that some fishes have the sclerotic nearly cartilaginous. With regard to the ear, it ought not to be forgotten that fishes, with no external ear or aperture, have in their native element an acuteness of hearing which, according to some respectable authorities, far exceeds our own, and Rosenthal states that the auditory nerve of the seal is very large. Respecting the sense of touch, we shall here quote M. F. Cuvier, who well remarks: "The whiskers are very sensible portions of the sense of touch. Those hairs placed on each side of the mouth and at the corner of the eye communicate with nerves which are remarkable for their size, and to which, as I have often convinced myself, the slightest impression communicates an immediate sensation." So it is, we believe, with the other senses, which we consider wonderfully adapted to both elements. Thus Buffon remarks of the monk seal on land: "It has a very acute hearing, since even at a distance it never failed to obey or respond to its master's voice;" and thus Capt. Scoresby: "Seals appear to hear well under the water. Music or particularly a person whistling draws them to the surface and induces them to stretch out their necks to the utmost extent, so as to prove a snare by bringing them within the reach of the shooter;" and Weddell: "Their sense of hearing is acute, and also their sense of smell." It is on account of this last sense that the Greenlanders always endeavor to approach them against the wind. And were we to judge of their taste by the keenness with which they relish their food—few animals possess it in equal perfection. The greatest gourmand's teeth do not water at the anticipation of the richest feast as do theirs in expectancy of their common food. "A copious saliva," says M. F. Cuvier, "fills and flows from their mouth during deglutition, and not less so the moment the seal perceives its prey."

As to their breathing, I will read from pages 56, 57, and 58, where the following is stated:

Having thus noticed that the external structure of these Amphibia is admirably adapted for their watery element, and yet made wonderfully conformable to their requirements on land, we proceed to remark that their vital functions also are strikingly fitted for their peculiar exigencies. Their respiration, as might readily be inferred, differs considerably from what is observed in most other animals. Even the air passages undergo a change which ought not to be overlooked. We refer particularly to the nostrils, whose state, unlike that of other quad-

rupeas, is that of being habitually closed, instead of being uniformly open. This was first noticed, we believe, in a walrus domesticated in England, of which, as will appear in our account of that animal, it was said: "It can open and shut its nostrils at pleasure." The Count Buffon again pointed out the peculiarity in a tame seal which he examined: "In the intervals of breathing, the nostrils were accurately closed, and, on the act of inspiration being completed, they were shut as before." M. F. Cuvier, at a later period, made a similar observation, so that we apprehend we may safely affirm that this peculiarity exists in the air passages as their ordinary condition. This state of parts of course supplies ready means of judging of the frequency of respiration, and here, too, there appears to be a marked difference, even on land, from what obtains among other animals. Thus Buffon, in the instance already alluded to, remarks: "The period between its several inspirations was very long; the creature opened its nostrils to make a strong expiration, which was immediately followed by an inspiration, after which it closed them, often allowing them minutes to intervene without taking another breath." In connection with this peculiarity, M. F. Cuvier makes an additional and important remark: "Notwithstanding the slow and irregular breathing of these animals, the regular supply of air to the lungs is in no degree diminished, if we may judge from the very free motion of the ribs, and the great quantity of air expelled at each expiration. In truth, the quantity of air taken in makes up for the small number of the respirations; for few of the Mammalia have appeared to me to have so high a natural temperature as the seals.

But, however great the peculiarity as exhibited on land may be, it is trifling when compared to its singularity in water, where it is not uncommon for these animals to remain for a quarter of an hour at a time under the surface (the usual period even for whales); and we are not prepared to state what the extreme limit may be. Thus, Crantz states that when harpooned they must come up in about a quarter of an hour to take breath; and Mr. Edmonston informs us that he once saw one of the bearded seals entangled in a net, which struggled with amazing force for more than twenty-five minutes without once inspiring, and yet was brought to the surface alive. An observation of M. F. Cuvier is still more remarkable. He states, concerning those which were preserved in the menagerie at Paris, that he has seen them while asleep keep their heads under water consecutively and consequently without breathing for an hour at a time. This is an extraordinary phenomenon, even allowing that the animal was in that somewhat lethargic condition to which we shall ere long allude.

As to their destruction, by unrestricted hunting, the following pages may be referred to: pp. 93, 95, 96, and 97, where it is said:

The time was when cargoes of those skins yielded \$5 or \$6 apiece in China, and the present price in the English market averages from 30 to 50 shillings per skin. The number of skins brought off from Georgia can not be estimated at fewer than 1,200,000; the Island of Desolation has been equally productive, and in addition to the vast sums of money which these creatures have yielded it is calculated that several thousand tons of shipping have annually been employed in the traffic.

* * * These valuable creatures have often been found frequenting some sterile islands in innumerable multitudes. By way of illustration, we shall refer only to the fur-seal, as occurring in South Shetland. On this barren spot their numbers were such that it has been

estimated that it could have continued permanently to furnish a return of 100,000 furs a year; which, to say nothing of the public benefit, would have yielded annually from this spot alone a very handsome sum to the adventurers. But what do these men do? In two short years, 1821-'22, so great is the rush that they destroy 320,000. They killed all and spared none. The moment an animal landed, though big with young, it was destroyed. Those on shore were likewise immediately despatched, though the cubs were but a day old. These of course all died, their number, at the lowest calculation, exceeding 100,000. No wonder, then, that at the end of the second year, the animals in this locality were nearly extinct. So it is, we add, in other localities, and so with other seals; so with the oil seals, and so with the whale itself, every addition only making bad worse. And all this might easily be prevented by a little less barbarous and revolting cruelty, and a little more enlightened selfishness. Fishermen are by law restrained as to the size of the meshes of their net in taking many of our more valuable fish; and in the Island of Lobos, in the River Plata, where, as we have seen, there are quantities of seals, their extermination is prevented by the governor of Montevideo, who farms out the trade under the restriction that the hunters shall not take them but at stated periods, ages, etc. * * *

With regard to the seal fishery of the south the English and Americans have exclusively divided it between them, and with very great profits. It has lately been stated that they together employ not fewer than sixty vessels in the trade of from 250 to 300 tons burden. These vessels are strongly built and have each six boats, like those of the whalers, together with a small vessel of 40 tons which is put in requisition when they reach the scene of their operations. The crew consists of about twenty-four hands; their object frequently being to select a certain fixed locality from which they make their various *battues*. Thus it is very common for the ship to be moored in some secure bay and to be partially unrigged, whilst, at the same time, the furnaces, etc., required for making the oil are placed on shore. The little cutter is then rigged and manned with about half the crew, who sail about the neighboring islands, and send a few hands on shore when they see seals, or where they wish to watch for them. This vessel can hold about two hundred seals rudely cut up, which will yield about 100 barrels of oil. This is transported to the headquarters and melted. The campaign frequently lasts for three years, and in the midst of unheard of privations and dangers. Some of the crew are sometimes left on distant barren spots, and the others being driven off by storms, they are left to perish or drag out for years a most precarious and wretched existence.

This evidence, from the highest English and French authorities, was stated to the scientific world more than fifty years ago, as a plea for the preservation of these valuable and docile animals. If we calculate the values they would have added to commerce, had Great Britain and the United States then agreed, as they do now, to adopt regulations for their protection, we must reproach ourselves if this Tribunal is not now equal to this important duty and if the regulations we adopt are not effectual to stop this great wrong.

The following pages, 275, 276, and 277, contain a description of fur-seals in the Antarctic, taken from the writings of Capt. Weddell:

Nothing regarding the fur seal is more astonishing than the disproportion in the size of the male and female. A large grown male, from the tip of the nose to the extremity of the tail, is 6 feet 9 inches, while the female is not more than 3½ feet. This class of the males, however, is not the most numerous, but being physically the most powerful they keep in their possession all the females to the exclusion of the younger branches; hence, at the time of parturition, the males attending the females may be computed as one to twenty, which shows this to be, perhaps, the most polygamous of large animals.

They are in their nature completely gregarious; but they flock together and assemble on the coast at different periods and in distinct classes. The males of the largest size go on shore about the middle of November to wait the arrival of the females, who of necessity must soon follow for the purpose of bringing forth their young. These in the early part of December begin to land, and they are no sooner out of the water than they are taken possession of by the males, who have many serious battles with each other in procuring their respective seraglios and by a peculiar instinct they carefully protect the females under their charge during the whole period of gestation. By the end of December all the female seals have accomplished the purpose of their landing. The time of gestation may be considered nearly twelve months, and they seldom have more than one at a time, which they suckle and rear apparently with great affection. By the middle of February the young are able to take to the water, and after being taught to swim by the mother they abandon them on the shore, where they remain till their coats of fur and hair are completed. During the latter end of February what are called the dog-seals go on shore; these are the young seals of the two preceding years, and such males as, from the want of age and strength, are not allowed to attend the pregnant females. These young seals come on shore for the purpose of renewing their annual coats, which being done by the end of April they take the water, and scarcely any are seen on shore again till the end of June, when some young males come up and go off alternately. They continue to do this for six or seven weeks, and the shores are then again abandoned till the end of August, when a herd of small young seals of both sexes come on shore for about five or six weeks, and then retire to the water. The large male seals take up their places on shore, as has been before described, which completes the intercourse all classes have with the shore during the whole year. The young are at first black; in a few weeks they become gray, and soon after obtain their coat of hair and fur.

When these South Shetland seals were first visited they had no apprehension of danger from meeting men; in fact, they would lie still while their neighbors were killed and skinned; but latterly they had acquired habits for counteracting danger by placing themselves on rocks, from which they could in a moment precipitate themselves into the water. The agility of this creature is almost greater than, from its appearance, an observer would anticipate. I have seen them, indeed, often escape from men running fast in pursuit to kill them.

These statements, collated in volume 12 of the Naturalist's Library, which Lord Hannen tells us is a standard work, were written about 1820 to 1830, and some of them earlier, by the most scientific natural-

ists who gathered the facts from personal observations. They relate to the same race of fur-seals at the antipodes that we are inquiring about in this case.

These able scientists enter minutely into all the characteristics of the fur-seals and other carnivorous amphibia and give exact descriptions of their actual and comparative anatomy. Their accounts furnish accurate data, in strong contrast with the guessing and conjectures of the tyros, many of them without previous experience, who were sent out to make a brief and necessarily superficial study of the Pribilof herd, chiefly with a view to bolster up special theories that are made the bases of the contentions that the Tribunal is now examining.

Although these books were written more than a half century ago, they are as accurate as a photograph as to the physical characteristics and the habits of the fur-seals of the North Pacific, and show that they are exactly now what the same species was one hundred years ago in the South Pacific Ocean.

I rely upon these exact and scientific statements of these learned and trained naturalists to clear up the doubts and reconcile or remove the conflicting conjectures of the numerous witnesses in this case who disagree chiefly because they are not well informed as to the subject. In the matter of the virility of the harem masters, the alleged barrenness of cows killed in July, August, and September, and the possible diseases that may have swept off large numbers of pups on the island, opinions are advanced with bold freedom by men whose opinions are not entitled to any weight whatever. I do not remember that any one of the many statements of the hundreds of witnesses who speak so confidently on these subjects is based either upon actual skill or actual examination, by dissection or in any practical way, of the characteristics of fur-seals. All the evidence shows that the breeding cows are fertilized within a few days—about ten days—after parturition, and that until that is accomplished the harem masters control their movements with the most jealous care, and none of them are permitted to go into the sea until they are impregnated. They then set out to get food to nourish the pups they have borne, carrying in their bodies the living germ of the next creation. In these early days the fact of fertilization is not discernible even on close examination to the unskilled eye; yet such examinations were not made, and these seal-hunters and so-called professors unhesitatingly testify that a cow seal, having milk in her breasts, is barren because there were no external signs that she was gravid with young.

And so it is in respect of the virility of the bulls, a fact that would probably defy the most exact scientific examination to prove, is stated with sublime confidence by Prof. Elliott and other like guessers. He finds the bulls at peace on the rookeries, and though they are not irritated by being crowded together as formerly, he concludes that because they have their domestic enjoyments without the necessity of jealous warfare that they have lost their virility. Among all polygamous animals endowed with fighting capacity nature provides for destroying the excess of males by the wars they wage upon each other. Breeders of animals reach this result without the necessity of permitting them to fight and kill each other. It requires very simple reasoning to reach the conclusion that, if this waste of physical energy is saved to breeding males by their separation from each other and the suppression of their warfare, that it will supply the virility to meet a greater demand upon their powers of procreation.

No dissections seem to have been made of dead pups found on the islands on one occasion to ascertain whether they had died of starvation or of disease, or were swept off by tempests and drowned and were thrown upon the coasts in "winrows" by the waves of the sea. Yet each witness gives his opinion as to what killed the pups with as much confidence as if he really knew what he was talking about.

The effort to account for the disparity of 81,000 killable seals on the islands between 1889 and 1890 by any of these mere conjectures is founded upon this sort of testimony and can not break the force of the fact that in 1890 the pelagic hunters got 51,655 seals, while on the islands, where 102,617 killable seals were taken in 1889, only 21,238 could be found the next season "by scraping the rookeries," as Lord Hannen observed.

The crucial test of the necessity of forbidding pelagic sealing with firearms in parts of the ocean where seals abound is the fact that it results necessarily and without doubt in the killing of great numbers of female seals, because of their disposition to sleep when gravid. They are more easily approached than the males, and the result is the destruction of a much larger proportion of females than of males. The encouragement of this indiscriminate killing of females, or its toleration, will establish a practice that violates every idea of the protection and preservation of the species. It legitimates a war upon the race that can not be restrained.

If we first deny to this race of valuable and docile animals (that have

less dread of the presence of man, whether on land or sea, than any other animal that is classed as a wild animal) all the protection that the law gives to animals that are domesticated, and for no other end than to protect the merely technical, cruel, and unrelenting claim of rights by its worst enemy, the pelagic sealer, we should never take to ourselves the credit of protecting and preserving them. When we arm those enemies with double-barreled shotguns, with cylinder cartridges charged with buckshot, and turn them in upon the herd to kill them indiscriminately after they have congregated in great numbers and are making their way to their only place of resort for the purposes of procreation, we, their only protectors, become their destroyers. This is not a hypothetical case or an exaggerated statement, but is the simple and undeniable truth.

This Tribunal, by such a decree, will deny to the fur-seal species, all over the world, that protection which the municipal law has always freely and even eagerly extended to all harmless, docile, and useful animals that are valuable to man for food and raiment. We will put upon them the ban of outlawry only because they must go into the sea for food, and because they do not need to be converted from their natural condition or disposition by the discipline or the temptations of the skill of man that must be used in taming savage beasts. Nature having dispensed with all necessity for such inducements and manipulations to overcome any aversion of the fur-seals to the dominion of man, and having delivered them into his hands as a free gift, to be used at his pleasure and to meet a want that no other animal can supply, the law steps in and declares that because nature has done this, and has so placed it out of man's power to make the seals any more docile and tame by inducements and manipulations than they are by nature, the fur-seals can never, as a class, become domestic or domesticated animals, and can receive no legal protection in the sea. They are forever excluded on such grounds from the legal possibility of domestication, and are handed over to the most formidable enemy that ever hunted any animal, tame or wild, doomed to inevitable destruction.

I dissent from such opinion as being contrary to the laws of God and the often-expressed legislative intentions of man; but I yield to it as the sincere judgment of this Tribunal, and refer to it to show *how much greater is the necessity now resting upon this Tribunal* in the amplitude of its powers supplied to them, for this occasion and for that purpose, *to afford substantial protection for the preservation of the species.* I will explain

my meaning when I say that the outlawry of the fur-seal species is contrary to the laws of God. Hundreds or thousands of years ago these animals and the Aleuts were brought in contact by the directing hand of Providence along the shores and on the islands of Bering Sea. No tree, no fruit, or grain, or grass, or cattle were there to support human life; but men were there, who subsisted on these fur-seals and were clothed in their skins. This was nearly the only food and raiment they could obtain in a climate as inhospitable and in a country as rugged and dreary as any on the habitable globe.

Only one hundred and fifty years ago, a powerful nation, Russia, came with her great ships and armaments and took the country and the people and the seal herds, by right of discovery, and supported its right by the title known to the law of nations as title by discovery—a most tyrannical and fraudulent maxim of international law which the civilized world has now practically abandoned. If this had never been done, the Aleuts would now be the owners and rulers of that country; and the question we are now discussing would be whether, under international law as it is now, the food and raiment—the only valuable resource of these poor and helpless people—could be taken by any great power and the people left to perish. In that case the consensus of the civilized powers would be that those animals should be considered the property of the Aleuts, the owners of the breeding islands, and when they left the coasts with the intention to return and visited the ocean for food, that they should at least be attended with the protection that is given by the law of all civilized nations to domesticated animals. This is the law of God, who first gave these animals to those northern tribes and made them the staff of life to them by reason of their docility, the regularity of their coming into the service of those people, and their complete submission to that service.

That law is not changed because the United States, a powerful and wealthy nation, has assumed to make provision for these people while lifting them into a higher civilization and finds in the fur-seals the revenue that is needed for these purposes. For more than one hundred years Great Britain and her subjects have known the fact that Russia and the United States have made these fur-seals the basis of a valuable industry; a means of providing for the Aleuts; an instrumentality of government; and almost the only source of revenue that country possessed. It was not until 1876 that any pelagic sealer entered Bering Sea, and that was a United States vessel that was captured and confiscated by that Government.

The seal hunters had depopulated the Antarctic Ocean of fur-seals, and had made many successful raids on the islands and coasts of Japan. Their poaching grounds had been exhausted and the hope of great profits drew them to Bering Sea. They found governmental resistance in Japan, Russia, and the United States, but they found in Canada a Government that would give countenance to their raids, and despite the best efforts of the United States and Great Britain, and of their ordinances closing Bering Sea to them, they now swarm upon the known route of the migration of the seals, which they follow with immense fleets. It was this sudden and dangerous movement that caused these nations to agree that this Tribunal should settle the questions that stood in the way of concurrent action between these Governments; and should then determine regulations for the proper protection and preservation of the fur-seals in the water, and not regulations to be provided for the protection of the pelagic hunters, who are the only human destroyers of the fur-seals that can not be otherwise completely restrained.

If we will take a correct view of the number and the power of these destroyers we shall see in the dangerous aggregation of those enemies a demand that we can not reasonably resist for preventing them from destroying the fur-seals placed under our protection by this treaty. In view of the very heavy forces that are and have been marshalled for this ruinous purpose, and that are really invited to increase their numbers and strength by the regulations offered for our adoption on behalf of Great Britain, we shall find a just and sufficient reason for firm action, without being left to conjecture upon a meager statement of facts, and abundant statements of loose, ignorant, muddy, conflicting, and partial opinions as to how much wanton and needless injury has already been done to seal life, and in what months of the year it has been done.

In 1892, the sealing fleet in the North Pacific Ocean numbered 122 vessels, 69 of which were under the British flag, and 53 under the flag of the United States. No other nations were participating in the hunt. Allowing to each vessel 8 sealing boats, though none had less than 5, and many of them had 15, there were 976 boats. There could not have been less than 1,000 boats. Giving to each boat a hunter and oarsman, there were 2,000 men employed in hunting. They also had the ship and its crew as a base for supply of ammunition and provisions, and to give assistance in skinning the seals after hoisting them into the ship,

and in disposing of the carcasses and salting and stowing the pelts. These crews, allowing 10 men and officers to each vessel, though the numbers were much greater, numbered 1,220; in all, 3,220 men. I place this estimate below that of both Governments because I believe that is a full allowance of the men needed, and this business requires no great investment of capital to make it profitable.

Each hunter has a rifle, and a double-barreled shotgun, and takes 100 rounds of ammunition on each excursion from the ship, which he usually expends in a day's work. The guns are breech-loading, rapid-firing weapons, and have fixed ammunition, made waterproof; and are fired by the impact of the hammer upon an explosive that is fixed in the base of each cartridge. The powder and the explosive for igniting it are charged into a copper cup or cylinder that forms the base of the cartridge, and the lead is imbedded in the cylinder, in front of the powder. A slight flange around the exterior of this cylinder at its base prevents its escape from the gun in firing, and when it is emptied a very simple contrivance removes the shell from the breach of the gun. Fifteen buckshot, each a deadly missile, is usually the charge of lead placed in each cylinder cartridge, and if a hunter fires 100 shots in a day, he discharges 1,500 of these missiles at, or into, the seals.

In 10 days of good sealing in the North Pacific out of 60, the single hunter would fire 15,000 deadly shots at close range; and in 15 days out of 90, in the Bering Sea, he would fire 22,500 deadly missiles at or into the seals, even under the more apparently forbearing and humane scheme of regulations offered by Sir John Thompson. But under the British scheme his opportunities would be much greater. In a sealing campaign of two months in the North Pacific and three months in Bering Sea—continuous months—the single hunter, during twenty-five days of good sealing out of one hundred and fifty-three days (Sundays included), would fire at and into the seals 37,500 deadly cartridge. One hunter with that opportunity, if he was moderately skilled in shooting seals, would destroy 2,000 or more seals in 153 days of hunting.

It is idle to suppose that out of 153 days of hunting he would not find 25 days of good sealing, in which he would fire 100 shots each day. The average for the entire period would be 24 shots each day for each hunter. Now multiply these figures by the number of hunters in the entire fleet of 122 vessels—967, and in the 25 days of good sealing weather out of the 153 days spent in the North Pacific and Bering

Sea, they would fire at and into the seals 3,550,824 cartridges, each loaded with 15 buckshot, all deadly missiles, and numbering 53,262,360.

Now, let us suppose that three-fourths of these shots failed to hit the seals and that only half of the number that hit them either killed the seals or wounded them mortally, and we expose this herd of seals to an annual loss of 443,853 seals at the very lowest possible estimate and upon a basis of facts that no one can safely dispute. This shows that not more than one seal is taken out of every five seals shot. This seal herd in its present depleted condition can not continue to exist if half that number of seals is taken from it in each of the years from 1894 to the end of the century. And if the percentage of female seals killed is equal to two-thirds or even half the whole number, the speed and certainty that must attend the destruction of the herd will be very greatly increased under the plan of Sir John Thompson.

If we expect that a less number of vessels will hereafter assemble for seal hunting than came in 1892, on what ground can we safely base such a conjecture?

The skins of seals are worth \$10 apiece; they were worth that much in 1821, and if the average catch of each vessel is only 250 for five months, or 50 seals a month, it is a very large earning, and it leaves half the year for other voyages. If the attack on the seals is permitted when they are herded together in Bering Sea in one vast body, or when traveling in large parties up the Pacific coast, the limiting of the hunting season to a brief period will only increase the activity of the pelagic sealers, and as much killing will be done with 200 vessels in one month as would be done with 100 in two months, if the open season was two months instead of one. We could no more safely assume that the sealing fleet in 1894 or 1895 will not exceed the number assembled in 1892 than we could have assumed in 1876 that pelagic hunting would be limited to a single vessel and could not possibly reach the number of 122 vessels by the year 1892. The experience of the last seventeen years on this subject is not to be disregarded. It is a living lesson of truth that the legerdemain of minor and astute calculations can not conceal under a cloud of doubt. The fact remains that in the year 1892, 122 vessels assembled in the North Pacific and took 73,394 skins of dead animals, killing or fatally wounding at least twice that number—146,788—in all, 220,182 seals, of which two thirds were females, numbering 146,794.

There can be but little doubt, on all the evidence, that the number

of female seals killed and wounded was more than double the number of skins that were taken. There is also as little doubt that two-thirds of the females killed or fatally wounded were gravid, and on their way to the islands to be delivered of their young; and each seal in that condition was then the repository of two lives that were thus destroyed; the unborn pups being 99,862.

This number, adding the number taken	73,394
And the number killed and wounded, but not taken.....	220,182
And the unborn pups of the 146,794 females killed or fatally wounded.....	99,862

Gives a total of.....	393,438
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How can it be said that, on the evidence in this case, this is not a true and safe estimate of the result of the work of destruction wrought by 122 sealing vessels in 1892, in the North Pacific while they were limited to those waters by the *modus vivendi* of 1891?

Reduce this estimate if you will by one-half and make it only 196,714 seals of all conditions and sexes that are killed, and the number destroyed is nearly twice as great as the number of seals that were killed and recovered in 1892. Until these facts are changed or expunged from the record, I can find no occasion for examining in this opinion the minor details that relate to other seasons. These facts, if they are to be repeated indefinitely, destroy all hope of preserving these seals.

The year 1892 with its actual experiences stands nearest to 1893, and is the safest, as it is the most complete, guide to the truth of the situation. I therefore take that year, with its ascertained facts and results, as the chief basis of my objections to the schemes of regulations proposed by Great Britain and departed from and modified, but scarcely improved, by the plan of Sir John Thompson.

That Sir John has found it necessary to depart from the British proposals is a grave concession, especially in the point so earnestly contested by Great Britain, that this Tribunal has no jurisdiction outside of Behring Sea. He proposes a zone of absolute prohibition of pelagic sealing of 10 miles around the Aleutian Islands.

In considering regulations as they may be shaped and modified by other considerations than the method that will best protect and preserve the particular class of fur-seals placed under the protection of this Tribunal by the treaty (if we are to take such liberties with our powers), the Tribunal must, in justice, examine into the rights of the pelagic sealers of the United States, in the Pacific Ocean and in Ber-

ing Sea, as they will be when the statutes of the United States shall permit them to enter with the Canadians and also with the people of other nations into that harvest field, and to have equal rights in the spoils that we are asked to place within their reach.

Although we have not yet considered the British case on its merits, which covers only the claim of right to unlimited and uncontrolled pelagic sealing, and have only considered the objections to the case of the United States that are stated in the British counter case, I must assume that the citizens and subjects of the respective Governments everywhere on the high seas are to have equal rights and privileges. If it is the right and privilege of the pelagic sealers of Canada to waylay the seals in May and June at Unimak Pass or any other pass, and in July, August, and September to waylay them in Bering Sea near the passes or near the breeding islands, the same right must be accorded to the citizens of the United States who for personal gain choose thus to violate the declared public policy of their Government.

If it must be that this Tribunal will inflict upon the United States the double indignity of having her wise and honorable policy of preserving the fur-seal species disregarded by her own people, under the suggestions of the award, and of requiring the concurrent action of Great Britain in the principles, if not in all the details of laws and of administration, in guarding the proposed 30-mile zone against intrusion by citizens of the United States, we should at least be careful to protect the United States against a definition of the rights and powers of pelagic sealers that is so radical as to break down the admitted rights and principles of self-defense.

The same necessity does not exist for guarding Great Britain with protective regulations, because no pelagic hunting is done within thousands of miles of any place where she has any sealing industry, and the interest of the pelagic hunters is in accordance with her present policy of giving them free rein in the destruction of fur-seals if they can make any money by the operation, as her policy is now disclosed in the regulations she has submitted.

As to citizens of the United States who would be thus encouraged by such an award policy to raid upon the industries and revenues of their Government during five months of the year and to defy its public policy, it may turn out that the United States will abandon them to their own devices for protection while they are engaged in this selfish, cruel, and unpatriotic work.

And here comes to view the most dangerous and difficult task and the most irritating that the two Governments will have to perform in regulating as between these pelagic sealers their rights while they are pursuing and capturing fur-seals with double-barreled shotguns. The pelts are worth \$10 each, a much larger sum than is the average yield of the richest gold mine per diem to the gold hunters; and we know how impossible it is to restrain by law the violence that has attended their struggles for "diggings," where none of them own the soil or any privilege in it except to discover new leads and to dig for gold.

On the high seas 30 miles or more from any land there are no courts and can not be any efficient police by either or both nations. Conceding to them the best intentions and the most honorable zeal in protecting the rights of all concerned, they will fail to prevent those personal conflicts between the ravenous pelagic sealers around the 30-mile zone, especially, which in the end will embroil the two countries.

The United States, as I have observed, may not choose to take up, as an international question, the quarrels of her citizens with Canadian subjects while they are both engaged in doing a great national wrong to that Government; but they will be, naturally, very chary of the dealings of Great Britain with such controversies. There will be no international court for the hearing of such controversies between private persons engaged in sealing in boats and canoes on the high seas, and they will probably be settled by the *vis major*. The fact that both parties will be heavily armed for assault upon the seals will make such collisions very dangerous, and their occurrence almost certain.

A United States sealer finds a school, or party of seals and goes to the leeward to get in gunshot of them; and a party of Canadians desiring to kill them, approaches the seals from the windward and shoots one with a rifle before the other hunter can get in range with his shotgun. A quarrel ensues and results in bloodshed. By a fiction of law, they are each upon the territory of their respective countries, and the settlement of that case, without the intervention of the Governments, would tax the wisdom equal to that of Solomon. If one sealer in his boat shoots at a seal that another is approaching from the other side, and wounds or kills the hunter, what is to be done in that case? That conflict will result from such occasions is almost certain, and how it can be settled is most uncertain. Illustrations are feeble to portray the difficulties and conjectures are far short of the reality as to the conflicts that must occur in the wild hunt for seals that the British regulations invite.

Sir John Thompson spoke of the generosity of the British Government in treating with the United States for the preservation of the fur-seals. There was as much generosity on one side as on the other, and none on either. It was a business matter relating to material interests and, I may well assert, of equal importance to both high contracting powers, which took its origin in what Sir John has aptly termed the "bursting in" of the Canadians into Bering Sea in 1886. It was a sudden "bursting in," and had the appearance of a violent and defiant experiment—a raid. Canada and the United States since 1818 have had many severe contentions over the fisheries of the northeastern coast, in which arrests of ships and of persons have led to very earnest discussion. The United States, claiming certain treaty rights there, have not burst into any of the waters that Canada has claimed as her fishing preserve, although her people have been treated there with severe inhospitality.

That Government has preferred to prevent collision and strife by restraining her people from bursting into places where they believed that their rights entitled them to go. It was an easy matter for Canada to have propounded its claim of rights to the United States, and to have had them decided upon without permitting her citizens to go into Bering Sea with their vessels and hunters armed with double-barreled shot guns and hunt seals up to the 3-mile limit, which she now admits should be 10 miles as to such hunting. It was quite as easy for Canada to restrain her citizens from bursting into Bering Sea as it was to enact her system of very stringent laws to protect her preserve of hair seals 1,000 miles from Canada, in the open ocean off the coast of Greenland. If Canada had passed any reasonable laws for protecting these interests of the United States, even during negotiations, a serious disturbance of neighborly feeling could have been avoided, and fearful havoc in the seal herds passing her coasts would have been prevented. The enactment of such a law would have enabled the United States to have controlled her own people as to hunting seals in the North Pacific without incurring the reproach from them of denying to them the privileges that Canadian subjects enjoyed on the high seas, and of allowing them to reap all the profits of the massacre of the fur-seals. The policy of Canada has made it impossible for Congress to restrain the people of the United States from participating in this reckless destruction, and from this defiance of her public policy and laws. Yet, in the presence of this obvious legislative impossibility, it seems equally

impossible to answer the thrust that is always made at the United States in argument, in censure of her conduct, that Congress has not enacted laws to prevent citizens of the United States from pelagic hunting in the North Pacific Ocean. The fact which no one seems to deny, that citizens of the United States took shelter under the British flag and Canadian registry to evade the laws of the United States excluding them from sealing in Bering Sea, seems to have been forgotten.

That fact alone shows how impotent would have been the laws of the United States to protect and preserve the fur-seals against the depredations of its own people while sealing under the shelter of the British flag. Canada controls the registry, licensing, and clearance of sealing vessels in her sea-ports, as is shown by her statutes relating to the hair-seal fisheries. A simple regulation would have saved the fur-seals from this exterminating raid that the evidence in this case has disclosed.

But Canadian subjects seem to have a double allegiance and a two-fold protection under their colonial system. The Canadian government can permit them, without control, to burst into Bering Sea and prevent the seals from reaching the islands of the United States, and when such raids are followed by arrests they can claim the imperial power of Great Britain to protect them.

Whatever censure, therefore, may be visited upon the United States for her dealings with her own people, it must be admitted that the difficulties of the situation have been caused by the policy that her neighbor has seen proper to pursue. If such censures had been just they would have been made by Great Britain when negotiations in respect to this treaty were pending. That Government did not venture to allude to the subject. It seems to have been held back as a make weight for the argument and considerations of this case.

When the United States shall have an opportunity to consider that question in her future discussions of such matters, should that be unhappily necessary, her vindication will be found to be complete. Mr. Bayard, who first pointed out the rights of the United States, which included, in substance, the five points we have just been discussing, and which were advanced subsequently with great earnestness by Mr. Blaine, proposed to leave those matters out of consideration, and to proceed at once to establish the regulation of pelagic hunting by designating an area within which a close season should be enforced. And afterwards, when arrests were made of the Canadian vessels that were killing seals in Bering Sea, Mr. Bayard ordered their release. This

was done, not because Mr. Bayard had receded from the attitude he held, as was contended by the British counsel in oral argument, but for the reason that a negotiation was pending for the settlement of all the controversy, and he did not think that it would promote good will between the nations to push the claims of the United States by the exercise of force while it was negotiating with Great Britain about the validity of those claims. After such example of considerate action on the part of the United States, it is not doing justice to either party to claim that the other was treating with it in a spirit of generosity or of forbearance.

Does anyone doubt that the United States acted, in all this controversy, upon a firm belief in the justice of its claims in every particular? If those claims were just, or made in that firm belief, it was a matter of as much concern to Great Britain as it was to the United States, both in the view of justice and as to the preservation of the peace, that they should be fairly considered and settled.

Great Britain has never, until the scheme of her regulations were presented to this Tribunal, asserted that the United States had not a special and peculiar interest in the fur-seals frequenting Bering Sea. In the diplomatic correspondence that Government conceded such a peculiar interest in the United States, but has at last got its consent to dwarf the concession to an area that would conform only to the interests of the Canadian sealers.

It was these men who compelled Great Britain to interpose for their protection, and when that Government found that their practices were destroying a great and valuable element of commerce, they demanded an investigation of the necessity for restraining pelagic hunting by a joint commission, and this is the initial point of this Arbitration.

Having touched on the general questions or subjects now presented for our consideration, and leaving to Mr. Justice Harlan the task he has chosen of making a closer examination of the evidence bearing on these questions, I will take up the plans or schemes of regulations, so far laid before the Tribunal, and endeavor to state my understanding of what they are and what will be the results if any of them are adopted.

The further remarks of Senator Morgan on this topic related to the comparative merits of the several schemes or projects of regulations presented to the Tribunal, and are not here given.